UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM 1934

No. 6355

RAILROAD RETIREMENT BOARD AND MURRAY W. LATIMER, JOHN T. WILLIAMSON, AND LEE M. EDDY, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD RETIREMENT BOARD, APPELLANTS

vs.

THE ALTON RAILROAD COMPANY AND OTHERS, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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Supreme Court of the District of Columbia

No. 57557 in Equity

THE ALTON RAILROAD COMPANY AND OTHERS, PLAINTIFFS

vs.

RAILROAD RETIREMENT BOARD AND MURRAY W. LATIMER, JOHN T. Williamson, and Lee M. Eddy, Individually and as Members of The Railroad Retirement Board, defendants

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

In the Supreme Court of the District of Columbia

No. 57557. In Equity

THE ALTON RAILROAD COMPANY AND OTHERS, PLAINTIFFS

vs.

RAILROAD RETIREMENT BOARD AND MURRAY W. LATIMER, JOHN T. Williamson, and Lee M. Eddy, Individually and as Members of the Railroad Retirement Board, defendants

Bill of complaint

Filed August 13, 1934

To the Supreme Court of the District of Columbia:

Plaintiffs respectfully show:

1

1. Each of the plaintiffs is a corporation duly organized and existing under the laws of the States of the United States respectively shown below, or is a receiver or trustee of such a corporation, regularly appointed and duly empowered to join as plaintiff in this suit, the corporate plaintiffs being citizens of, and the plaintiff trustees and receivers being citizens and residents of, the States respectively shown below:

The Alton Railroad Company, Illinois.
The Alabama Great Southern Railroad Company, Alabama.
The Atchison, Topeka and Santa Fe Railway Company, Kansas.
Atlanta and West Point Rail Road Company, Georgia.
Atlanta, Birmingham and Coast Railroad Company, Georgia.
Atlantic Coast Line Railroad Company, Virginia.
The Baltimore & Ohio Railroad Company, Maryland.

Bangor and Aroostook Railroad Company, Maine.
Bessemer and Lake Erie Railroad Company, Pennsylvania, Ohio.
Boston & Maine Railroad, New Hampshire, Massachusetts, Maine, New York.
Burlington-Rock Island Railroad Company, Texas.
The Central Railroad Company of New Jersey, New Jersey.
Central Vermont Railway, Incorporated, Vermont.
Charleston & Western Carolina Railway Company, South Carolina.
The Chesapeake and Ohio Railway Company, Virginia.
Chicago and Erie Railroad Company, Indiana.
Chicago & Illinois Midland Railway Company, Illinois.
Chicago and North Western Railway Company, Illinois, Wisconsin, Michigan.
Chicago, Burlington & Quincy Railroad Company, Illinois.
Chicago Great Western Railroad Company, Illinois.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Wisconsin.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company, Wisconsin.
The Cincinnati, New Orleans and Texas Pacific Railway Company, Ohio.
Clinchfield Railroad Company, Virginia.
The Colorado and Southern Railway Company, Colorado.
Columbus and Greenville Railway Company, Mississippi.
The Delaware and Hudson Railroad Corporation, New York.
The Delaware, Lackawanna, and Western Railroad Company, Pennsylvania.
The Denver and Rio Grande Western Railroad Company, Delaware.
Detroit, Toledo and Ironton Railroad Company, Delaware.
The Detroit and Toledo Shore Line Railroad Company, Michigan.
Duluth, Missabe and Northern Railway Company, Minnesota.
The Duluth, South Shore, and Atlantic Railway Company, Michigan.
Duluth, Winnipeg and Pacific Railway, Maine.
Elgin, Joliet and Eastern Railway Company, Illinois, Indiana.
Erie Railroad Company, New York.
Fort Worth and Denver City Railway Company, Texas.
Fort Worth & Rio Grande Railway Company, Texas.
Georgia, Southern and Florida Railway Company, Georgia.
Grand Trunk Western Railroad Company, Indiana, Michigan.
Great Northern Railway Company, Minnesota.
Green Bay and Western Railroad Company, Wisconsin.
Gulf and Ship Island Railroad Company, Mississippi.
Gulf, Colorado and Santa Fe Railway Company, Texas.
Gulf, Mobile and Northern Railroad Company, Alabama, Mississippi, Tennessee.
Illinois Central Railroad Company, Illinois.
Illinois Terminal Company, Illinois.
The Kansas City Southern Railway Company, Missouri.
Kansas, Oklahoma & Gulf Railway Company, Oklahoma.

Lake Superior & Ishpeming Railroad Company, Michigan.
The Lehigh & Hudson River Railway Company, New York, New Jersey.
Lehigh and New England Railroad Company, New Jersey, Pennsylvania.
Lehigh Valley Railroad Company, Pennsylvania.
The Long Island Railroad Company, New York.
Los Angeles & Salt Lake Railroad Company, Utah.
Louisiana & Arkansas Railway Company, Delaware.
Louisiana, Arkansas & Texas Railway Company, Texas.
Louisville and Nashville Railroad Company, Kentucky.
Maine Central Railroad Company, Maine.
Midland Valley Railroad Company, Arkansas.
Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Minnesota, Wisconsin, Michigan, North Dakota.
Missouri-Kansas-Texas Railroad Company, Missouri.
Missouri-Kansas-Texas Railroad Company of Texas, Texas.
Monongahela Railway Company, Pennsylvania.
The Nashville, Chattanooga & St. Louis Railway, Tennessee.
Nevada Northern Railway Company, Maine.
New Jersey and New York Railway Company, New York, New Jersey.
New Orleans and Northeastern Railroad Company, Louisiana.
The New York Central Railroad Company, New York, Ohio, Illinois, Indiana, Pennsylvania, Michigan.
The New York, Chicago and St. Louis Railroad Company, New York, Pennsylvania, Ohio, Indiana, Illinois.
The New York Connecting Railroad, New York.
The New York, New Haven & Hartford Railroad Company, Connecticut, Massachusetts, Rhode Island.
New York, Ontario and Western Railway Company, New York.
New York, Susquehanna and Western Railroad Company, Pennsylvania, New Jersey.
Norfolk and Western Railway Company, Virginia.
Northern Alabama Railway Company, Alabama.
Northern Pacific Railway Company, Wisconsin.
Northwestern Pacific Railroad Company, California.
Oklahoma City-Ada-Atoka Railway Company, Oklahoma.
Oregon Short Line Railroad Company, Utah.
Oregon-Washington Railroad & Navigation Company, Oregon.
Panhandle and Santa Fe Railway Company, Texas.
The Pennsylvania Railroad Company, Pennsylvania.
Pennsylvania-Reading Seashore Lines, New Jersey.
Pere Marquette Railway Company, Michigan.
The Pittsburgh and Lake Erie Railroad Company, Pennsylvania, Ohio.
The Pittsburgh & Shawmut Railroad Company, Pennsylvania.
The Pullman Company, Illinois.
Railway Express Agency, Incorporated, Delaware.
Reading Company, Pennsylvania.

Richmond, Fredericksburg and Potomac Railroad Company, Virginia.
Rutland Railroad Company, Vermont.
The St. Joseph and Grand Island Railway Company, Kansas, Nebraska.
St. Louis, San Francisco & Texas Railway Company, Texas.
St. Louis Southwestern Railway Company, Missouri.
St. Louis Southwestern Railway Company of Texas, Texas.
San Diego & Arizona Eastern Railway Company, California.
Southern Railway Company, Virginia.
Southern Pacific Company, Kentucky.
Southeastern Express Company, Alabama.
Spokane, Portland and Seattle Railway Company, Washington.
The Staten Island Rapid Transit Railway Company, New York.
Tennessee Central Railway Company, Tennessee.
Texarkana and Fort Smith Railway Company, Texas.
Texas and New Orleans Railroad Company, Texas.
The Texas and Pacific Railway Company, Act of Congress.
Toledo, Peoria & Western Railroad, Illinois.
Union Pacific Railroad Company, Utah.
The Virginian Railway Company, Virginia.
Western Maryland Railway Company, Maryland, Pennsylvania.
The Western Pacific Railroad Company, California.
The Western Railway of Alabama, Alabama.
The Wheeling and Lake Erie Railway Company, Ohio.
The Yazoo and Mississippi Valley Railroad Company, Mississippi.
H. B. Stewart, Trustee of The Akron, Canton & Youngstown Railway Company, Debtor, Ohio.
Norman B. Pitcairn, Missouri, Frank C. Nicodemus, Jr., New York, Receivers of The Ann Arbor Railroad Company.
L. W. Baldwin, Missouri, Guy A. Thompson, Missouri, Trustees of The Beaumont, Sour Lake & Western Railway Company, Debtor.
Henry D. Pollard, Receiver of Central of Georgia Railway Company, Georgia.
Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company, Debtor, Illinois.
Chicago, Indianapolis and Louisville Railway Company, debtor, Indiana.
Frank O. Lowden, Illinois, James E. Gorman, Illinois, Joseph B. Fleming, Illinois, Trustees of The Chicago, Rock Island & Gulf Railway Company, Debtor.
Frank O. Lowden, Illinois, James E. Gorman, Illinois, Joseph B. Fleming, Illinois, Trustees of The Chicago, Rock Island & Pacific Railway Company, Debtor.
W. R. Kenan, Jr., New York, S. M. Loftin, Florida, Receivers of Florida East Coast Railway Company.
L. B. Barry, Jr., Receiver of Fort Smith and Western Railway Company, Arkansas.
L. W. Baldwin, Missouri, Guy A. Thompson, Missouri, Trustees of International-Great Northern Railroad Company, Debtor.
W. H. Bremner, Receiver of The Minneapolis and St. Louis Railroad Company, Minnesota.

L. W. Baldwin, Missouri, Guy A. Thompson, Missouri, Trustees of Missouri-Illinois Railroad Company, Debtor.

L. W. Baldwin, Missouri, Guy A. Thompson, Missouri, Trustees of Missouri Pacific Railroad Company, Debtor.

T. M. Stevens, Alabama, C. E. Ervin, Missouri, Receivers of Mobile and Ohio Rail Road Company.

L. W. Baldwin, Missouri, Guy A. Thompson, Missouri, Trustees of New Orleans, Texas & Mexico Railway Company, Debtor.

Louis H. Windholz, Virginia, Morris S. Hawkins, Virginia, Receivers of Norfolk Southern Railroad Company.

H. B. Stewart, Trustee of The Northern Ohio Railroad Company, Debtor, Ohio.

L. W. Baldwin, Missouri, Guy A. Thompson, Missouri, Trustees of The St. Louis, Brownsville and Mexico Railway Company, Debtor.

J. M. Kurn, Missouri, John G. Lonsdale, Missouri, Trustees of St. Louis-San Francisco Railway Company, Debtor.

L. W. Baldwin, Missouri, Guy A. Thompson, Missouri, Trustees of San Antonio, Uvalde & Gulf Railroad, Debtor.

Legh R. Powell, Jr., Virginia, Henry W. Anderson, Virginia, Receivers of Seaboard Air Line Railway Company.

Norman B. Pitcairn, Missouri, Frank C. Nicodemus, Jr., New York, Receivers of Wabash Railway Company.

Each of the plaintiffs is a carrier by railroad, or an express company or a sleeping car company, subject to the Interstate Commerce Act, or is a receiver or trustee in the possession of the business of such a carrier, and is a carrier as defined by an Act of Congress approved June 27, 1934, entitled "An Act to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes", therein designated the Railroad Retirement Act and hereinafter referred to as the Act. For convenient reference a copy of the Act is appended hereto.

2. Plaintiffs bring this their bill of complaint against the defendants Railroad Retirement Board and Murray W. Latimer, John T. Williamson, and Lee M. Eddy as individuals and as members of such Board. By the terms of the Act defendant Railroad Retirement Board is an independent agency in the executive branch of the Government with its principal office in the District of Columbia. Defendants Murray W. Latimer, John T. Williamson, and Lee M. Eddy are the members of and constitute the said Board, and defendant Murray W. Latimer is its chairman. Each of the individual defendants is a citizen of the United States and has his official residence and is to be found in the District of Columbia.

3. Plaintiffs have a common interest in the subject of this suit, and in obtaining the relief herein sought, in that all of them are subject in substantially the same way to the operation of the Act. The interests of the plaintiffs are common in the further particulars that they are all required to contribute to a common "railroad retirement fund" and that the "service period" of each employee, upon which the annuities provided by the Act are based, is not confined to his service for a single carrier, but includes and accumulates his service for all carriers. Unless plaintiffs join in a common suit it will be necessary that each bring a separate suit for the determination and

protection of its rights. The promotion of the convenient administration of justice and the prevention of a multiplicity of suits justify and require that plaintiffs unite their causes of action and join in this single suit.

II

This is a suit of a civil nature wherein the matter in controversy exceeds, as to each plaintiff, the sum or value of three thousand dollars ($3,000.00) exclusive of interest and costs. The suit arises under the Constitution and laws of the United States in that plaintiffs claim the Act is invalid for the following, among other reasons:

1. Congress by the Act exceeded its powers under the commerce clause of the Constitution because the provisions thereof have no reasonable relation to the promotion of efficiency or safety of interstate transportation; because the means it prescribes therefor are unreasonable and arbitrary; and because it applies to all employees, including those not engaged in any commerce, those engaged exclusively in intrastate commerce, and those not engaged in interstate commerce or work so closely related thereto as to warrant regulation in order to promote efficiency or safety of interstate transportation, and also applies to certain persons not employees.

2. Congress by the Act exceeded its powers derived from the commerce clause of the Constitution because while the Act, in Section 2, states as one of its purposes the promotion of "efficiency and safety in interstate transportation," its real ends and aims, expressly declared in the same section, and by the whole Act, are to provide for "satisfactory retirement of aged employees", and to "make possible greater employment opportunity and more rapid advancement of employees in the service of carriers"; and the Act itself requires that it be so administered and construed, in the following words:

"This act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees."—

none of which ends and aims is within any power delegated to Congress by the Constitution.

3. The Act unlawfully imposes upon plaintiffs and each of them the obligation to pay large sums of money into the Treasury of the United States as contributions to a common fund for the payment of annuities to their employees from the time of their retirement until death; unlawfully interferes with management; unlawfully classifies and discriminates against plaintiffs; and prescribes other arbitrary and unreasonable requirements. It thereby deprives plaintiffs and each of them of their property and liberty of contract without due process of law and takes their property without just compensation, all in violation of the Fifth Amendment to the Constitution.

4. The Act discloses on its face that it is experimentation at the expense of plaintiffs; furthermore, it authorizes the Board to require of plaintiffs contributions for administration and research, and without limiting the amount—all in violation of the Fifth Amendment.

III

The facts with reference to employees who are not engaged in interstate commerce and persons who are not employees of the plaintiffs or any other carriers, but in each case are nevertheless beneficiaries under the act, are as follows:

1. Many of the persons in plaintiffs' employ do no work in the interstate commerce conducted by plaintiffs, and no work so closely connected therewith as to be a part thereof or to be within the regulatory power of Congress under the commerce clause. The services of such persons are confined wholly to executive duties or to work relating to finances, custody or administration of securities or funds, corporate proceedings or corporate records, taxes, titles, experimentation, research, claims, litigation, accounting, advertising, industrial development, and traffic solicitation; or work relating to the management, operation, care, or protection of buildings and lands not devoted to or used in connection with transportation; or work relating to the construction of buildings and lines of railway, the construction of new equipment, or the reconstruction or major repair of other equipment withdrawn from transportation service; and office and clerical assistance in connection with the work above described. It is not practicable to recite the occupations or duties of all of plaintiffs' employees whose work is outside interstate commerce, but some of the plaintiffs have employees exclusively engaged in all, and all of them have employees exclusively engaged in some, of the classes of work hereinabove set forth. The exact number of those so engaged in the employ of the several plaintiffs varies, but in the aggregate the number is not less than 200,000, or approximately one-fifth of all the employees of plaintiffs. The amount of wages paid by plaintiffs to such employees is not less than $300,000,000 annually. In addition, large numbers of plaintiffs' employees are engaged exclusively in intrastate commerce.

Under the Act plaintiffs are required to make contributions to the Railroad Retirement Fund based on the compensation paid by them to the persons above described, and such persons become eligible to annuities as provided by the Act, in the same manner as persons engaged in the interstate commerce conducted by plaintiffs.

2. There are in the employ of plaintiffs more than 9,500 persons of age 70 or more, whom Section 4 of the Act itself will require to leave the service of plaintiffs permanently February 1, 1935. They will contribute less than $250,000 to the fund, but will receive therefrom as a bounty for past service not less than $9,000,000 the first year and not less than $74,000,000 to termination of annuities, two-thirds of which will be required to be paid by the carriers.

3. Within one year before the approval of the Act more than 50,000 of plaintiffs' employees left carrier service and have not returned to it. At the time the Act was approved such persons were not, and since then have not been, employees of any carrier or connected in any way with any business conducted by the carriers. Under the Act, as plaintiffs are advised and charge the Act is construed and is about to be enforced by defendants, plaintiffs are required to contribute to annuities for such persons.

4. Plaintiffs have in their employ approximately one million persons, and during times of normal industrial conditions had and will have a much larger number. There are frequent changes in personnel. Under sections 3 and 5 of the Act, as plaintiffs are advised and charge the Act is construed and is about to be enforced by defendants, plaintiffs are required to contribute to annuities for all persons who, subsequent to its enactment, are in carrier service and shall leave such service at any age whatever and with any service period whatever, which annuities are not payable until such persons respectively reach 65 years of age, but are payable then and thereafter, regardless of how long such persons at that time shall have been entirely out of such service.

5. In the orderly conduct of the business of transportation by plaintiffs it is necessary from time to time to release from their service employees found to be detrimental to its efficiency or safety. It is not practicable to state the number of employees so released from service annually by each of the plaintiffs, but the number in the aggregate is approximately 5,000 persons. Under the Act, as plaintiffs are advised and charge the Act is construed and is about to be enforced by defendants, plaintiffs are required to contribute to annuities for persons so released from service, payable when they reach 65 years of age, without regard to the unsatisfactory nature of their service which made their release necessary.

Plaintiffs expressly deny the correctness of the construction of the Act adopted by defendants as set forth in foregoing paragraphs numbered 3, 4, and 5, and aver that the Act, properly construed, does not make eligible for annuities the persons referred to in those paragraphs. But because of this conflict of opinion concerning the meaning of the Act, it is necessary for the protection of plaintiffs' rights that they present to this Court the facts stated in said paragraphs 3, 4, and 5, in order to show the application of the Act to such persons if the construction of the defendants be correct.

As set forth in foregoing paragraphs 1 to 5, the Act includes objects beyond the power of Congress under the commerce clause by extending its benefits to persons who have no opportunity to add to the efficiency or safety of interstate transportation, and is unreasonable and arbitrary.

IV

1. The relationship between each plaintiff and each person in its employ consists of a contract of employment freely and fairly made, by which the work to be done and the compensation to be paid therefor were agreed upon and fixed, and by which the employer is required to pay such wages and no more. Each plaintiff has paid, and intends to continue to pay in full when due, all wages so agreed upon. Sections 3 and 5 of the Act require each plaintiff, through the Railroad Retirement Fund, to pay additional sums, not contracted for, to each employee when he reaches age sixty-five or when he completes thirty years' service, if he so demands and leaves the service, and to make like payments to him monthly throughout the remainder of his life; and the Act prevents plaintiffs from employing any person in the future for any purpose except on condition that,

in addition to the contractual obligation for agreed wages, they assume the further obligation to pay him annuities as provided by the Act.

The amount which each plaintiff thus will be required to pay through the Railroad Retirement Fund to its employees and to the employees of the other plaintiffs cannot be ascertained, but it will be many thousands of dollars annually in the case of each plaintiff, and for all the plaintiffs it will be not less than $60,000,000 for the first year, based upon the present pay rolls of plaintiffs and the 4-percent rate fixed by the Act, and the amount will increase year by year for many years. The Act thus will deprive plaintiffs, and each of them, of their liberty of contract and of their property without due process of law.

2. The obligation imposed upon plaintiffs to contribute to the payment of annuities to persons who have ceased or shall cease to work for them is dependent solely upon their having attained a specified age or having performed thirty years' service. The employees of plaintiffs have no peculiarity of age, physical or mental condition, or other characteristic distinguishing them from members of society generally. The selection of carriers' employees as the beneficiaries of a compulsory pension system payable by the carriers is beyond the power of Congress, is arbitrary, and deprives plaintiffs and each of them of their property without due process of law, and imposes upon plaintiffs a burden which, if it exists at all, should be borne by society as a whole.

V

1. Section 3 of the Act provides for annuities for employees who have a service period of more than thirty years and are between 51 and 65 years of age. Each of the plaintiffs now has and will always have a large number of such employees who are competent to continue their service. The aggregate number of such employees at the time of approval of the Act was not less than 100,000. It is desirable in the public interest that these trained and experienced persons remain in the carrier service. Their right to such annuities depends solely upon the demand of such employees, and the right so to demand does not take into account or depend upon the character of service in which they are engaged, their fitness for further service, or the public need for their continuance in carrier service. This requirement that pensions be paid to such employees who are not incapacitated by age or otherwise is arbitrary and unreasonable, does not promote interstate commerce but tends to injure it, and deprives plaintiffs and each of them of their property without due process of law.

2. Each of plaintiffs now has and always will have a large number of executives, officials, and expert employees who possess valuable special knowledge and qualifications which are the result of many years of study and practical experience. Their training and experience are of much value to the plaintiffs and to the public. Their enforced retirement under Section 4 of the Act does not promote efficiency or safety in interstate transportation, deprives plaintiffs

and each of them of their valuable property right to continue such persons in their service, and deprives plaintiffs and each of them of their property without due process of law.

VI

Except in certain instances of joint operation involving merely incidental use of a small number of joint employees, no employee of any plaintiff is in the employment of the other plaintiffs or any of them, and the business conducted by each plaintiff is separate and distinct from that conducted by the others and each of them. Facts showing the mingling and pooling of their affairs and funds and the service periods of their employees under the Act are as follows:

1. There are now in the employment of plaintiffs, as hereinbefore shown, more than 9,500 men, other than those occupying official positions, who at the time of the approval of the Act had reached the age of seventy and who therefore, under Section 4 of the Act, must be retired February 1, 1935, with annuities. Their average annual annuity will be approximately $1,000 and the aggregate amount which will be paid to them during the first year will be approximately $9,000,000. Upon established actuarial principles the gross sum that will be paid to them to termination of annuities will be approximately $74,000,000. All of the employees herein referred to are employees of 81 of the plaintiffs; the remaining 56 of the plaintiffs have no such employees but employ 37 percent of all persons employed by all the plaintiffs. The 56 plaintiffs which have no such employees under the Act will be required to contribute approximately $2,200,000 during the first year and approximately $19,000,000 to termination for annuities of such employees of the 81 carriers. Likewise, there is a wide variance among the several carriers in percentage and number of employees of other age classifications and a wide variance in respect to the past service periods of their respective employees. The contribution of each plaintiff to the pool will not depend upon the age characteristics or service periods of its own employees, but upon the fortuitous facts in these respects concerning the employees of all the carriers.

2. By the terms of Section 1 (b) of the Act persons in carrier service before but not after June 27, 1933, are ineligible for annuities, but service after that date creates eligibility for annuities, based not alone on the subsequent service, but on the prior service as well. There are more than 1,000,000 persons with such prior service but without such subsequent service. There are at least 700 carriers subject to the Act. By reason of the provisions in Section 1 (f) of the Act for pooling service periods, each of these ex-employees, by procuring employment with any carrier, without the knowledge or consent of the others, will receive for his past carrier service not otherwise pensionable, an annuity commencing when he reaches age 65, payable from the common fund.

3. In the ordinary course of railroad business a number of carriers cease operation each year. Persons retired from the service of carriers which hereafter shall cease to exist or which for any other reason shall cease to contribute will continue nevertheless to be

eligible for annuities payable from the Retirement Fund to which the remaining carriers must contribute.

4. There are not less than 1,500 officers or other official representatives of railway labor unions who are not now performing any service for the carriers, but who are duly designated and authorized to represent employees under the Railway Labor Act. Their average age is greater than the average age of carrier employees. A substantial portion of their annuities, the exact amount of which cannot be computed, will be paid by the carriers because under Sections 1 (b) and 7 of the Act the service of such persons for carriers is pooled with their service for labor organizations as a basis for their annuities, their contributions and the contributions of carriers are paid into the common Railway Retirement Fund, and their participation in the retirement system is not compulsory but depends on their election.

By reason of the facts set forth in the foregoing paragraphs 1 to 4, the Act, and particularly its pooling provisions, are arbitrary and unreasonable and deprive plaintiffs and each of them of their property without due process of law.

VII

Insofar as the Act includes in the basis for annuities service rendered prior to the approval of the Act, it has no relation to future interstate commerce but arbitrarily and unlawfully operates only on past services and events. Practically all of the persons in the employ of each of the plaintiffs at the time of the approval of the Act were in the employ of such plaintiff or of other carriers, defined in the Act, at times and for periods prior thereto. Such times and periods of prior employment vary greatly, and it is impracticable to ascertain, as to each such person, the exact period of such prior employment with any carrier, but as to the majority of such persons the prior employment embraces many years. Said prior employments are, and at the time of the approval of the Act were, closed and completed transactions.

Immediately upon the approval of the Act, and solely by reason thereof, there came into existence and was imposed upon plaintiffs and each of them an obligation in respect of such past services of carrier employees which, exclusive of any subsequent service periods, under established actuarial principles, will amount in the aggregate to hundreds of millions of dollars.

VIII

Facts relating to the financial condition of the carriers, showing the arbitrary nature of the Act under existing circumstances, are as follows:

There are at the present time in the United States approximately 40,000 miles of railroad in the hands of receivers or trustees in bankruptcy, a larger mileage in this condition than at any previous time in history.

One hundred and thirty-four of the plaintiffs are Class I railroads (defined as railroads having annual operating revenues above

$1,000,000); they employ approximately 97.3 percent of all persons employed by all railroads in the United States; they pay approximately 97.9 percent of all compensation paid to employees by all such railroads; and they receive 98.0 percent of all operating revenues of all such railroads.

Fifty-five Class I railroads of the United States failed to earn operating expenses and taxes during the calendar year 1932; thirty-four failed to earn operating expenses and taxes in 1933; and thirty-three failed to earn operating expenses and taxes in the first six months of 1934.

The value of the properties of Class I railroads devoted to transportation, as found by the Interstate Commerce Commission, brought down to the end of the year 1932, was $22,074,000,000, and the net railway operating income of said Class I railroads for the year 1932 was approximately 1.48 percent of said value. Such value so determined for the year 1933 was $21,800,000,000, and the net railway operating income for that year was approximately 2.18 percent of said value. Even these low earnings were possible only through drastic retrenchment in expenditures and the exercise of the utmost economy consistent with safety.

Effective July 1, 1934, January 1, 1935, and April 1, 1935, wage reductions theretofore in force by agreement between the Class I carriers and their employees, rendered necessary by the existing depression in industry, including transportation, were restored. Such restorations will increase the annual labor cost of Class I carriers by more than $165,000,000. There has been and will be a further increase in operating cost due to the increased and increasing prices of materials and supplies. Such increase for the year 1934 compared with the lower price levels of 1933 will be approximately $125,000,000.

The net railway operating income of Class I carriers for the entire year 1934, based on the results for the first six months, and allowing for these increases in labor costs and costs of materials and supplies, will be substantially less than for 1933.

Approximately 20 percent of all the commercial freight traffic and approximately 35 percent of all the commercial passenger traffic in the United States is now conducted by motor carriers or water carriers or other competing agencies, and practically all freight and passenger traffic, except certain heavy freight moving in car lots, is the subject of active competition among the various forms of transportation. By reason of these competitive conditions it is impossible for plaintiffs to obtain through increased rates or increased volume of traffic sufficient additional revenue to meet the contributions required by the Act in addition to the other increases in operating expenses.

The Act, by imposing upon Class I railroads the obligation to contribute approximately $60,000,000 during the first year to the railroad retirement fund, unreasonably and unnecessarily diminishes their capacity to furnish adequate, safe, and efficient transportation service, and in no wise promotes the safety or efficiency of interstate commerce.

Transportation by railroad in the United States is now conducted more efficiently and safely than ever before, and its safety and

efficiency have constantly increased for many years. The burdens of the Act are disproportionate to its benefits, if any it has, which plaintiffs deny, and if it were otherwise valid, under the circumstances above shown it is arbitrary and unreasonable as a regulation of interstate commerce and deprives plaintiffs of their property without due process of law.

IX

As grounds for the interposition of a court of equity and for the relief herein sought, plaintiffs state:

By the terms of the Act defendants are required, and they are asserting authority, to exercise all the duties and powers necessary to administer the Act, and to take such steps and institute and prosecute such proceedings and actions as may be necessary to enforce it. This they threaten to do and, unless enjoined, they will issue orders and commence proceedings, in the courts and otherwise, against the plaintiffs, and each of them, to compel their obedience to various provisions of the Act. Defendants intend and threaten forthwith, pursuant to Section 9 of the Act, to demand from plaintiffs and to order them to pay immediately into the Treasury of the United States large sums of money as advances upon the payments which the Act provides shall be made by carriers. Defendants also intend and threaten forthwith to order plaintiffs to furnish a great mass of statistical data that can only be prepared and furnished by plaintiffs at large cost to them. Defendants further intend and threaten to set up forthwith large clerical, accounting, and administrative forces in order to establish and maintain separate accounts for each of the more than one million employees and former employees of plaintiffs who come within the provisions of the Act, all at great cost to these plaintiffs.

The defendants also threaten to assess and enforce against each of the plaintiffs a penalty of one percent for each month it shall delay the payment of any amount required to be paid by it under the Act. Such assessment and penalties will be recurring because such payments must be made quarterly, or at such other times as ordered by the Board. It is not possible to ascertain or state the exact amount which would be so assessed against each of the plaintiffs from time to time, but it would be a large amount as to each plaintiff, and the aggregate amount as to all plaintiffs would be not less than from $150,000 to $225,000 per month at the end of the first quarter, and not less than from $600,000 to $900,000 per month at the end of the fourth quarter, depending upon possible constructions of the language of the Act.

Unless plaintiffs and their respective officers and agents comply with the requirements of the Act, defendants will also institute and prosecute, or cause to be instituted and prosecuted, against plaintiffs' officers and agents having to do with such matters repeated criminal actions, each carrying possible punishment by fine of not less than $100 nor more than $10,000, or by imprisonment not exceeding one year.

By reason of the heavy penalties and punishments imposed by the Act, and the repeated charges of violation which would be involved, plaintiffs cannot safely disregard the Act or cause or induce their respective officers and agents to disregard it.

If plaintiffs make deductions from the wages of their employees and pay the same into the Treasury of the United States, as required by the Act, and the Act thereafter be adjudged invalid, they will be forced to repay to their employees the amounts so deducted, or will be subjected to a multiplicity of suits by their respective employees to recover such deductions. Plaintiffs cannot safely comply with the requirements of the Act that they pay into the Treasury of the United States either such funds so deducted, which would amount to not less than $30,000,000 the first year, or the contributions required of plaintiffs, which would amount to not less than $60,000,000 the first year, because plaintiffs, and each of them, would be without adequate remedy to recover the same.

The defendants have not prescribed any rules and regulations under Section 6 of the Act, or taken any action or threatened to take any action thereunder. Plaintiffs cannot anticipate what, if any, action will be taken thereunder, and, therefore, at this time ask no relief based thereon.

Unless relief be found in equity and by the injunctive process of this Court, there will result a multiplicity of suits against the plaintiffs and each of them and a multiplicity of prosecutions of their officers and agents, and these plaintiffs and each of them will suffer irreparable loss and injury. Plaintiffs have no plain, adequate, and complete remedy at law in the premises, and only in a suit of this nature can the questions here involved be adequately determined and proper relief had.

Plaintiffs express their willingness and intention to do equity in the premises.

WHEREFORE plaintiffs and each of them pray that defendants and each of them and their successors in office and all those acting or claiming to act under their authority or by their direction be restrained and enjoined, both temporarily pending the suit and permanently at the final hearing, from making any order and from instituting or taking any steps toward the institution of any actions, proceedings, or prosecutions designed to compel plaintiffs or their officers, or any of them, to make any advance payment or other payment required by the Act, or to compel them to assemble, compile, or furnish any of the information and records required, or which may be required, to be furnished under the Act, or to compel them to change their existing relations with any of their employees, or in any wise to put plaintiffs in a worse position with respect to any of the matters here involved; and they pray that the Act and each and every provision thereof be declared void and of no effect.

To the end, therefore, that defendants may, if they can, show why plaintiffs should not have the relief herein prayed for, plaintiffs pray that the Court issue its writ of subpoena directed to the defendants and each of them requiring them to appear and answer this bill, but not under oath, their answers under oath being expressly waived, and

to abide by and perform such orders and decrees in the premises as to the Court shall seem proper and required by the principles of equity and good conscience, and that the plaintiffs shall have such further, other, and general relief as may be equitable.

SYDNEY R. PRINCE,
15th and K Sts. NW., Washington, D. C.,
ROBERT V. FLETCHER,
JACOB ARONSON,
EDWARD S. JOUETT,
DENNIS F. LYONS,
EMMETT E. MCINNIS,
Attorneys for Plaintiffs.

DISTRICT OF COLUMBIA, *ss:*

JOHN G. WALBER, being duly sworn, on his oath, says that he is Vice President of The New York Central Railroad Company, one of the plaintiffs herein; that he has read the foregoing bill of complaint and is familiar with the facts therein stated and that the same are true.

JOHN G. WALBER.

Subscribed and sworn to before me this 10th day of August 1934.

[NOTARIAL SEAL] P. K. HOWARD,
Notary Public.

My commission expires May 24, 1935.

APPENDIX

RAILROAD RETIREMENT ACT

[Public—No. 485—73d Congress]
[S. 3231]

An Act To provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled—

DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,*

That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means each person in the service of a carrier, subject to its continuing authority to supervise and direct the manner of rendition of his service, who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service. The term "employee" also includes each officer or other official representative of an "employee organization", herein called "representative", who has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during, or following employment by a carrier, is engaged in such representative service in behalf of such employees.

(c) The term "Board" means the Railroad Retirement Board hereby created.

(d) The term "annuity" means regular payments at the end of each completed month during retirement, ceasing at death or at resumption of compensated service.

(e) The term "service" means the employment relation between an employee and a carrier whether before or after the enactment hereof.

(f) The term "service period" means the total service of an employee for one or more carriers whether or not continuously performed, and includes as one month every calendar month during which the employee has been paid compensation by a carrier and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(g) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(h) The term "age" means age at the latest attained birthday.

(i) The term "carrier contribution" means the payment to be made by each carrier.

(j) The term "employee contribution" means the payment to be made by each employee.

(k) The term "voluntary contribution" means the payment made by an employee equal to the total of both the employee and the carrier contribution.

(l) The term "effective date" means the 1st day of the second month after the taking effect of this act.

(m) The term "Railroad Retirement Act" means and may be used in citing this Act and subsequent amendments thereto.

PURPOSES

SEC. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in interstate transportation, and to make possible greater em-

ployment opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this act to perform and fulfill the obligations imposed thereby. This act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

SPECIAL REPORT

(b) Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy and permanency of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations.

ANNUITIES

SEC. 3. Each employee having attained the age of sixty-five years, or having completed a service period of thirty years, shall be paid an annuity, to begin on a date specified in a written application, which date shall not be more than sixty days before the making of the application. No annuity shall begin less than six months after the effective date. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the number of years of service, not exceeding thirty years, by the following percentages of the monthly compensation: 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the compensation in excess of $150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee has received compensation from any carrier out of eight consecutive calendar years of such services ending December 31, 1931. No part of any monthly compensation in excess of $300 shall be recognized in determining any annuity for any employee contribution. The annuity shall be reduced by one-fifteenth of such annuity for each year the employee is less than sixty-five years of age at the time of the first annuity payment. No such reduction shall be made if the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. Upon death of an employee before or after retirement an amount, equal at his death to a computation, with interest at 3 per centum compounded annually, of the accumulation from his payments less any annuity payments received by him, shall be paid as he may have designated or

to his legal representative. Any employee who upon retirement shall be entitled to an annuity with a value determined by the Board of less than $300 shall be paid such value in a lump sum.

RETIREMENT

SEC. 4. Retirement shall be compulsory upon employees who, on the effective date, have attained or thereafter shall attain the age of sixty-five years. The carrier and the employee may, by an agreement in writing filed with the Board, extend the time for retirement as to such employee for one year and for successive periods of one year each, but not beyond the age of seventy years. Until five years from the effective date, the compulsory retirement shall not apply to an employee who from and after the effective date occupies an official position in the service of a carrier.

CONTRIBUTION

SEC. 5. Each employee shall pay an employee contribution in a percentage upon his compensation. Each carrier shall pay a carrier contribution equal to twice the contributions of each employee of such carrier. The employee compensation shall be the compensation for service paid to such employee by the carrier excluding compensation in excess of $300 per month. The contribution percentage shall be determined by the Board from time to time, and shall be such as to produce from the combined employee and carrier contributions, with a reasonable margin for contingencies, the amount necessary to pay the annuities, other disbursements and the expenses becoming payable from time to time. Until the Board shall determine on a different percentage the employee contribution percentage shall be 2 per centum. Employee contributions shall be deducted by the carrier from the compensation of its employees and shall be paid by the carrier, together with the carrier contributions, into the Treasury of the United States quarterly or at such other times as ordered by the Board.

EXISTING PENSION SYSTEMS

SEC. 6. The Board shall have the power to provide by appropriate rules and regulations for substituting the provisions for annuities and other benefits to employees under this Act, for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and to transfer such obligations to the retirement system herein established. If the fulfillment of any such transferred obligation shall require additional contributions or larger payments than would otherwise be required under the provisions of this Act, then such additional contributions shall be made by the carrier originally responsible for the creation of such obligation or for the excess amount of such payments over those which would be required under the provisions of this Act. In the event that the Board is unable to

make satisfactory arrangements with any carrier for the substitution of the provisions under this Act for its existing pension system, then, and in that event, the provisions of this Act shall be applied to said carrier and its employees without regard to any conflict or duplication in the operation of such an existing pension system and the operation and effect of the provisions of this Act: *Provided*, That the Board, at its option, shall have power, in lieu of the foregoing provisions of this section, to order that all former employees of carriers, who prior to the effective date have become separated from the service at the age of seventy years or over and who may or may not be receiving age-retirement benefits, shall be entitled to the benefits of this Act.

EMPLOYEE REPRESENTATIVES

SEC. 7. Any representative of an employee organization who is included within the definition of "employee" in paragraph (b), section 1, of this Act shall have the option, but shall not be required to continue or to become a beneficiary under the provisions of this Act. If he shall elect to continue or to become such a beneficiary he shall pay all voluntary contributions.

For the purposes of this section the requirements of section 4 of this Act shall not apply. Service rendered to an employee organization shall be included in computing the total service period of such representative.

For such representative who shall elect to become a beneficiary under this Act, the basic compensation upon which contributions shall be made and benefits calculated shall be that compensation paid by the carrier for service rendered in the position to which the rights of such representative would entitle him for the period defined in section 3 of this Act: *Provided*, That if no definite and specific rights obtain, the average compensation paid to the four employees whose last date of entry in the service is nearest the date of entry in the service of the same carrier by such representative, shall be his basic compensation to be determined for the period defined in section 3 of this Act. When a question arises as to rights under this provision the Board shall investigate and determine rights of such representative.

For such representative who elects to continue as a beneficiary under the provisions of this Act, his basic compensation shall be the average monthly compensation paid to him by the carrier during the last twelve months of active service with such carrier.

RETIREMENT FUND

SEC. 8. All moneys paid into the Treasury under the provisions of this Act, all interest, and other receipts, and all refunds of moneys paid out under this Act shall constitute and be kept in a separate fund in the Treasury to be known as the "railroad retirement fund." At the request and direction of the Board, the Treasurer of the United States, with the approval of the Secretary of the Treasury, is authorized to invest such funds as are not immediately required for disbursements in interest-bearing bonds, notes, or other obligations of the United States, and to collect the principal and interest of such securi-

ties and to sell and dispose of the same as in the judgment of the Board shall be in the interest of said fund. There is hereby appropriated such sums not in excess of the amounts in said fund as may be necessary to pay all annuities, other disbursements, and the expenses of administration of this Act.

RETIREMENT BOARD

SEC. 9 (a) PERSONNEL.—There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years, without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of employees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act. The members and employees of the Board shall be included as employees under this Act and together with employees receiving annuities shall be furnished free transportation in the same manner as such transportation is furnished to employees.

(b) DUTIES.—The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall receive and take such steps and institute and prosecute such proceedings and actions as may be necessary to enforce the payments and obligations required under the Act, make and certify awards and payments, and account for all moneys and funds necessary thereto. The Board may require such advances upon the payments of carriers as necessary to put this Act into operation. The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated therefor, to require and compel the attendance of witnesses, administer oaths, take testimony, and make

all necessary investigations in any matter involving annuities or other payments, and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board and shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the payments to be required to provide for all annuities, other disbursements and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

COURT JURISDICTION

SEC. 10. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise, under the provisions of this act;

(a) An application by the Board to compel an employee or other person residing within the jurisdiction of said court, or a carrier subject to service of process within said jurisdiction, to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this act.

(b) An application by an employee or carrier to the Supreme Court of the District of Columbia or to the district court of any district wherein the Board maintains an office or has designated an agent authorized to accept service in its behalf, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take an action, or to make a decision necessary for the enforcement of a legal right of the applicant, when the applicant shall establish his right to a judicial review upon the jurisdictional ground that, unless he is granted a judicial review of the action or decision, or failure of the Board to act or to decide, of which he complains, he will be deprived of a constitutional right to obtain a judicial determination of his alleged right.

(c) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this act.

EXEMPTION

SEC. 11. No annuity or death payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever.

PENALTY—CARRIER

SEC. 12. On the failure of any carrier to make any payment when due under the provisions of this Act, such carrier, unless excused by order of the Board, shall pay an additional 1 per centum of the amount of such payment for each month such payment is delayed.

OTHERS

SEC. 13. Any employee, other person, officer, or agent of a carrier subject to this Act who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act or who shall willfully fail or refuse to make any accounting required under this Act, or who shall knowingly make any false or fraudulent statement or report required for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act shall be punished by a fine of not less than $100 nor more than $10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 27, 1934.

Answer to bill of complaint

Filed September 5, 1934

Now come the defendants in the above-entitled cause, and, reserving to themselves the right to move to dismiss the Bill of Complaint by reason of its failure to state any cause of action in equity, make answer to said Bill of Complaint as follows:

I

For their answer to the allegations contained in Part I of the Bill of Complaint,

1. Defendants admit that the plaintiffs are carriers as defined by the Railroad Retirement Act. Defendants have no knowledge as to the remaining allegations in paragraph 1, but make no issue with respect to them.

2. Defendants admit the allegations contained in paragraph 2.

3. Defendants admit the allegations contained in paragraph 3.

II

For their answer to the allegations contained in Part II of the Bill of Complaint, the defendants admit that the above-entitled cause arises under the Constitution and laws of the United States, and that the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs.

1. Defendants deny that in enacting the Railroad Retirement Act, Congress exceeded its powers under the commerce clause of the Constitution, that the provisions of the Act have no reasonable relation to the promotion of efficiency or safety in interstate commerce, that the provisions of the Act are unreasonable or arbitrary, or that the Act applies to any employees who are not engaged in interstate commerce or in work so closely related thereto as to warrant regulation in order to promote efficiency or safety of interstate transportation. Defendants aver that grounds other than the promotion of efficiency and safety of interstate transportation also exist to support the exercise of the power of Congress under the commerce clause of the Constitution; and they further aver that all persons who are defined as employees in the Act are engaged in work which is within the regulatory powers of Congress.

2. Defendants deny that the real ends and aims of the Act are as stated in paragraph 2. Defendants aver that the real ends and aims of the Act are as stated therein, and are reasonable means of promoting efficiency and safety in interstate transportation, and are within the power delegated to Congress by the Constitution.

3. Defendants admit that the Railroad Retirement Act requires plaintiffs to pay sums of money into the Treasury of the United States as contributions to the common fund for the payment of annuities to their employees from the time of their retirement until death. Defendants deny that the Act imposes this obligation unlawfully. Defendants deny that the Act interferes with management unlawfully, or otherwise, or that it unlawfully classifies or discriminates against plaintiffs, or that it prescribes any arbitrary or unreasonable requirements, or that it deprives the plaintiffs, or any of them, of their property or liberty of contract without due process of law, or takes their property without just compensation.

4. Defendants admit that the Act authorizes the Railroad Retirement Board to conduct investigations and research for the betterment of the administration of the Act, and that the expense of such investigation and research may be defrayed from the retirement fund. Defendants deny that the Act is an experimentation at the expense of the plaintiffs. Defendants aver that the provisions for investigation and research are reasonable and necessary for the administration of the Act, and are beneficial to the retirement fund and to the plaintiffs.

III

For their answer to the allegations contained in Part III of the Bill of Complaint,

1. Defendants deny that there are any persons in the plaintiffs' employ who are employees, as defined in the Railroad Retirement Act, and who are not engaged in the interstate commerce conducted

by plaintiffs or in work so closely connected therewith as to be within the regulatory powers of Congress under the commerce clause of the Constitution of the United States. Defendants admit that there are persons in the plaintiffs' employ who for periods of time are engaged exclusively in the occupations listed in the second sentence of the first paragraph of Part III of the Bill of Complaint; but the defendants haye no knowledge as to the number of such employees or as to the amount of wages paid annually to them by the plaintiffs. Defendants admit that plaintiffs are required to make contributions to the Railroad Retirement Fund based on the compensation paid by them to such employees; but the defendants deny that such employees are not engaged in interstate commerce or in work so closely connected therewith as to be subject to the regulatory powers of Congress. The defendants aver that all of plaintiffs' employees who are employees as defined in the Act are engaged in work which is within the regulatory power of Congress.

2. Defendants have no knowledge as to the exact number of plaintiffs' employees who are 70 years of age or over and whom Section 4 of the Act will require to leave the service of the plaintiffs permanently February 1, 1935. Defendants have no knowledge as to the exact amount that such employees will contribute to or receive from the retirement fund. Defendants admit that there are such employees and that they will receive a greater amount from the retirement fund than they will contribute to it. And the defendants further admit, for the purposes of this cause, that the ratios between the estimated amounts contained in said paragraph 2 are reasonable and true.

3. Defendants have no knowledge as to the number of plaintiffs' employees, if any, who within one year before the approval of the Railroad Retirement Act, left carrier service and have not returned to it. Defendants deny that such persons, if any there are, were not, at the time the Act was approved, employees of any carrier or connected in any way with the business conducted by the carriers. Defendants admit that employees in the service of the plaintiffs within one year prior to the enactment of the Act are entitled to annuities from the retirement fund, if and when they satisfy all other requirements provided in the Act for those seeking annuities thereunder.

4. Defendants admit that the plaintiffs have in their employ approximately one million persons, and that they had a larger number in their employ in the past; but defendants have no knowledge as to the number of persons that the plaintiffs will have in their employ in the future. Defendants admit that there are frequent changes in personnel in the employ of each of the plaintiffs. The defendants admit that all employees, as defined in the Railroad Retirement Act, who are in carrier service subsequent to the enactment of the Act and who shall leave such service at any age and with any service period, are entitled to annuities if and when they satisfy all the other requirements provided by the Act for persons seeking annuities thereunder, regardless of how long such employees shall have been entirely out of carrier service at the time of the payment of the annuities. But the defendants aver that the Act does not require or authorize the use, in the determination of the

amount of such annuities of time spent entirely out of carrier service; that, on the contrary, the Act requires that such annuities shall be based only on the periods of time spent in carrier service, subject to the variation in the case of employee representatives provided in Section 7 of the Act.

5. Defendants have no knowledge as to the number of plaintiffs' employees who are from time to time released from service because they are found to be detrimental to its efficiency or safety; but the defendants admit that such employees are eligible to receive annuities under the Railroad Retirement Act, based upon their periods of service, if and when they satisfy all the other requirements provided by the Act for persons seeking annuities thereunder.

Defendants aver that the Act, as interpreted in the foregoing paragraphs 1 to 5, inclusive, does not cover any subject beyond the powers of Congress under the commerce clause of the Constitution, and that the inclusion in the benefits of the Act of the persons mentioned in the said paragraphs is a reasonable and proper exercise of power by Congress and is reasonably calculated to avoid hardship and unjust discrimination in the incidence of the retirement and pension system established by the Act.

IV

For their answer to the allegations contained in Part IV of the Bill of Complaint,

1. Defendants admit that the plaintiffs are required to make contributions to the Railroad Retirement Fund as required in the Railroad Retirement Act, and that employees of carriers subject to the Act are entitled to annuities under the conditions stated therein. But the defendants deny that the Act fixes or varies the amounts of compensation to be paid to the plaintiffs' present or future employees, and deny that the Act deprives the plaintiffs, or any of them, of their liberty of contract or of their property without due process of law. Defendants admit that the amount which the plaintiffs will be required to contribute to the Railroad Retirement Fund in the first year will be approximately Sixty Million Dollars. And they admit that, after four or five years, this amount may increase from time to time until a maximum level is reached.

2. Defendants deny that the selection of railway employees as the beneficiaries of the compulsory pension system provided in the Railroad Retirement Act is beyond the power of Congress or arbitrary, or that it deprives the plaintiffs, or any of them, of their property without due process of law.

V

For their answer to the allegations contained in Part V of the Bill of Complaint,

1. Defendants admit that Section 3 of the Railroad Retirement Act provides for annuities to employees who have a service period of more than thirty years and are between fifty-one and sixty-five years of age. Defendants have no knowledge as to the exact number of such employees who were in the service of the plaintiffs at

the time of approval of the Act or who will be in their service in the future, but the defendants admit that there were at the time of approval of the Act, are now, and will be in the future a number of such employees in the plaintiffs' service. Defendants admit that the Act authorizes such an employee to retire and receive an annuity before he reaches the age of sixty-five, provided that, except in the case of retirement because of disability, such annuity shall be less than the annuity to which he would be entitled if he retired at the age of sixty-five by one-fifteenth of the latter annuity for each year the employee is less than sixty-five at the time of the first annuity payment. Defendants are without knowledge as to whether any of plaintiffs' employees between the ages of fifty-one and sixty-five years who are eligible for retirement under the Act are competent to continue in service. Defendants aver that the Act does not in any way prohibit or prevent such employees from continuing in carrier service until they attain the age of seventy years. Defendants further aver that because of the reduction in the amount of the annuity payable to employees who have a service period of thirty years and who retire below the age of sixty-five, as provided in Section 3 of the Act, the number of employees who will elect to retire before the age of sixty-five will be small, and that the retirement of many of those who will so elect will be, by virtue of the reduction, profitable to the Railroad Retirement Fund and to the plaintiffs in that the drain on the fund will be smaller than it would be if such employees retired at the age of sixty-five. Defendants deny that the said provisions of the Act authorizing the payment of annuities to employees with a service period of thirty years or more who are between fifty-one and sixty-five years of age are arbitrary or unreasonable or deprive the plaintiffs, or any of them, of their property without due process of law, or are not reasonable regulations of interstate commerce.

2. Defendants admit that plaintiffs have a number of executives, officials, and expert employees who possess special knowledge and qualifications as the result of many years of study and practical experience. The defendants deny that the enforced retirement of such employees under the conditions stated in Section 4 of the Act does not promote efficiency or safety in interstate transportation, or deprives plaintiffs, or any of them, of their property without due process of law. Defendants aver that the compulsory retirement provisions of Section 4 are not applicable to plaintiffs' employees who occupy official positions until five years from the effective date of the Act, August 1, 1934; and the defendants further aver that under Section 4 of the Act plaintiffs and their employees may in any event agree to extend the time for retirement for successive periods of one year until the employees reach the age of seventy.

VI

For their answer to the allegations contained in Part VI of the Bill of Complaint, defendants admit that the Railroad Retirement Act requires the pooling of the contributions of the plaintiffs to the Railroad Retirement Fund, and the aggregation of service on any carrier subject to the Act for the purpose of determining the service periods by which employees' annuities are to be measured. Defend-

ants deny that the business conducted by any of the plaintiffs is separate and distinct from that conducted by the others, or any of them.

1. Defendants have no knowledge as to the exact number of persons in the plaintiffs' employ who at the time of the approval of the Act had reached the age of seventy and who must be retired on February 1, 1935, with annuities. Defendants have no knowledge as to the amount of annuities which will be paid to such employees or as to the distribution of such employees among the several plaintiffs. Defendants deny that there is a significant variance among the several carriers in percentage of employees of the several age classifications, at least under the age of seventy, or that there is a significant variance among the several carriers in respect of the past service periods of their respective employees. Defendants admit that the contributions of all carriers to the Railroad Retirement Fund will be pooled, and that annuities will be paid out of the Fund to employees who had attained the age of seventy at the time of the approval of the Act and to other employees without regard to the ratios of the contributions of the particular carriers in whose service the beneficiaries were prior to retirement. Defendants aver that the Act requires each plaintiff to contribute to the fund only in proportion to the compensation paid to its own employees, and that the pooling of the contributions in the fund is reasonable and necessary and beneficial to the plaintiffs.

2. Defendants admit that persons in the service of the carriers before and not after June 27, 1933, are ineligible for annuities under the Railroad Retirement Act, and that service after that date creates eligibility for annuities, based not alone on such subsequent service but also on the prior service. Defendants have no knowledge as to the exact number of persons with such prior service and without such subsequent service, but believe the estimate of 1,000,000 to be reasonable. The defendants admit that there are at least 700 carriers of all classes subject to the Act.

3. Defendants admit that some carriers cease operations in the ordinary course of railroad business. Defendants admit that employees of such carriers are eligible to annuities under the Act if and when they satisfy all the other requirements provided by the Act for persons seeking annuities thereunder. Defendants aver that the number of such carriers which totally disappear and are not reorganized is not significant and that the number of employees of such carriers is unsubstantial; defendants further aver that the annuities of such employees are based only on the periods of time spent in active carrier service.

4. Defendants admit that there are approximately 1,500 officers or other official representatives of railway labor unions duly designated and authorized to represent employees under the Railway Labor Act. The defendants have no knowledge as to whether the average age of such persons is greater than the average age of other carrier employees. Defendants deny that such officers or official representatives are not performing any service for the carriers. Defendants aver that such officers or official representatives are required, if they elect to participate in the benefits of the Railway Retirement Act, to contribute both the carrier and the employee contributions to the Rail-

road Retirement Fund. Defendants deny that the participation of such present officers and official representatives in the pension system places any substantial additional burden upon the plaintiffs.

Defendants deny that the pooling provisions of the Act, as admitted in the foregoing paragraphs 1 to 4, inclusive, are arbitrary or unreasonable, or that they deprive the plaintiffs, or any of them, of their property without due process of law.

VII

For their answer to the allegations contained in Part VII of the Bill of Complaint, defendants deny that the inclusion in the basis for annuities of service rendered prior to the approval of the Railroad Retirement Act has no relation to future interstate commerce, or arbitrarily or unlawfully opeates only on past services and events. Defendants admit that practically all of the persons in the employ of the plaintiffs at the time of the approval of the Act were in the employ of the plaintiffs or other carriers, as defined in the Act, at times and for periods prior thereto. Defendants have no knowledge as to the exact length of such prior service. Defendants deny that such prior services were at the time of the approval of the Act closed or completed transactions. Defendants admit that the Act requires the plaintiffs to contribute to annuities measured in part by such prior service and that the amount of such annuities attributable to that measure will ultimately aggregate hundreds of millions of dollars. But defendants deny that this cost is incurred by the plaintiffs solely by reason of the Act; and defendants aver that a very large part, if not the whole, of the cost to the plaintiffs was incurred by them apart from and without the compulsion of the Act. Defendants further aver that the prior service is only a measure of the amounts of the annuities provided by the Act and that it is a convenient, reasonable, and necessary measure.

VIII

For their answer to the allegations contained in Part VIII of the Bill of Complaint defendants aver that the allegations of fact contained in Part VIII are allegations as to matters of public record to which the defendants beg to refer. Defendants admit the allegations insofar as they accord with the public record and deny them insofar as they differ with the public record. Defendants aver that the plaintiffs have not exhausted the practical possibilities of retrenchment in expenditures and economy consistent with safety. And defendants aver that the plaintiffs have manifested their own opinion that they have not exhausted the practical possibilities of increased operating revenue. The defendants have no knowledge as to the amount by which the plaintiffs' labor cost will be increased by virtue of the restoration of previous wage reductions. And the defendants have no knowledge as to the future trend of prices of materials and supplies, or as to whether the plaintiffs' operating costs will be increased thereby or as to the amount of such increase, if any.

Defendants deny that by imposing the obligation upon the plaintiffs to contribute approximately Sixty Million Dollars during the first year to the Railroad Retirement Fund the Railroad Retirement Act unreasonably or unnecessarily diminishes their capacity to furnish adequate, safe, and efficient transportation or service, or that it does not promote the safety or efficiency of interstate commerce. Defendants deny that the burdens of the Act are disproportionate to its benefits, or that the Act is an arbitrary or unreasonable regulation of interstate commerce, or that it deprives the plaintiffs of their property without due process of law.

IX

For their answer to the allegations contained in Part IX of the Bill of Complaint the defendants raise no issue as to the equity jurisdiction of this Court in this cause. Defendants admit that they intend to carry out the provisions of the Railroad Retirement Act.

WHEREFORE defendants pray that the Bill of Complaint herein be dismissed and that defendants be awarded their costs.

HAROLD M. STEPHENS,
Assistant Attorney General.
HAMMOND E. CHAFFETZ,
Special Assistant to the Attorney General.
HARRY SHULMAN,
Special Counsel to the Railroad Retirement Board.

Statement of evidence

At the hearing of the above-entitled cause, beginning Wednesday, October 10, 1934, before Mr. Chief Justice Alfred A. Wheat, the following proceedings were had:

Counsel for plaintiffs and counsel for defendants advised the Court that by agreement plaintiffs had served their affidavits in chief on defendants, giving time to defendants to prepare their counter affidavits; thereupon defendants had served their counter affidavits on plaintiffs, giving plaintiffs time to prepare their affidavits in reply; and thereupon plaintiffs had served on defendants their affidavits in reply; and that it was stipulated and agreed between the parties that the hearing should be had on such affidavits without further testimony, subject to any particular objections either party might make to any affidavit or part thereof of the other party.

Mr. McInnis, of counsel for plaintiffs, made an opening statement of the case for plaintiffs.

Mr. Chaffetz, Special Assistant to the Attorney General, made an opening statement for defendants.

Plaintiffs offered in evidence the following affidavits of Julius H. Parmelee, identified as Parmelee 1 to 4, respectively, and marked in evidence as "Plaintiffs' Exhibits Nos. 1 to 4":

Plaintiffs' Exhibit 1

AFFIDAVIT

Filed Oct. 11, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

JULIUS H. PARMELEE, being first duly sworn, deposes and says:

That he is a transportation economist of more than 25 years' practical experience; that he holds a doctor's degree in economics from Yale University and has taught economics at that university for three years; that for four years he served as a special examiner for the Interstate Commerce Commission and in similar capacities for the United States Census Bureau and other Federal organizations; that since 1911 he has been a member of the staff of the Bureau of Railway Economics at Washington and since 1920 has been director of said Bureau. The Bureau of Railway Economics was established and is maintained by the railways of the United States for the scientific study of transportation problems. In these several capacities, and as editor and author on transportation topics, affiant states that he has had occasion to, and has, made extensive studies of the various phases of railway transportation, and is very familiar with the railway transportation system of the United States, with the subjects that are comprised within the general terms "Railway Economics", with statistics regarding the business of the railways of the United States, with the records of the Bureau of Railway Economics and with official records of the Interstate Commerce Commission and other governmental departments as to railroads.

Affiant has spent months of intensive study since 1932 on questions raised by the various railroad pension bills introduced in Congress and by the Railroad Retirement Act passed at the last Congress. In the latter part of 1932 he made a very exhaustive study of the ages and service periods of employment of 129 of the principal Class I railroads of the United States. As Director of the Bureau of Railway Economics he sent out comprehensive questionnaires to elicit from the Class I railroads detailed and complete information as to the numbers of employees in service, the years of birth of the employees, the years in which each entered the service of the particular carrier, and the continuous service periods with that carrier thereafter. Affiant received full and complete replies to these questionnaires from 129 of said Class I railroads, analyzed, compiled, and tabulated the data contained in the said replies, and embodied the same in a table showing the results of the said study, which table is attached hereto and marked as Exhibit A to this affidavit.

Affiant presented this table and study, and numerous statistical studies based thereon, to the Interstate Commerce Committees of the Senate and the House of Representatives during the consideration by those Committees of various bills for railroad pensions pending before the Seventy-second and Seventy-third Congresses. Affiant furnished the said table, Exhibit A, showing the results of said study, to the proponents of the various bills and to the members of

the said Committees, and the said study and table was accepted, considered, and used as a correct statistical study of the subject covered, by the proponents of the bills and by the members of the Senate and House Committees, and its accuracy and reliability has never been questioned. Affiant has also furnished the said table, Exhibit A, representing the said study, to William Breiby, an expert actuary employed by the Committee of Counsel representing the plaintiffs in this cause, to the end that the said Breiby might use the said table and study as a basis for certain actuarial studies which he has made and which are incorporated in an affidavit made by the said Breiby for use in this cause.

Affiant makes this affidavit with knowledge that it is to be used as evidence in the trial of the above-entitled case or at any hearing that may be held therein. Statistics hereinafter given by the affiant cover in a large measure the entire railroad industry of the United States, and affiant has not, and no one person could have, personal knowledge as to the basic facts from which the statistics are produced. But affiant hereinafter shows as to each class or group of statistics the sources from which he secured the information upon which his statistical studies are based.

I

Number of Employees in the Employ of Plaintiffs of Age 70 or More Who Will Be Required by Section 4 of the Act to Leave the Service of Plaintiffs Permanently February 1, 1935. Bill of Complaint III, 2, Page 13

The defendant Railroad Retirement Board by its Order No. 2, issued on the 21st day of August 1934 and addressed to all carriers subject to the Railroad Retirement Act, and by the questionnaire thereto attached, called upon all said carriers to furnish on or before the 15th day of September 1934 the name and address, date of birth, and position, together with other information, of every employee in the service of each such carrier on or after June 27, 1933, who at the time of such report was living and who was born on or before February 1, 1865; that is, of all such employees who will have reached the age of seventy on or before February 1, 1935. The said order and questionnaire further required each said carrier as to each said employee to state whether or not, in the carrier's opinion, the employee occupied an official position, and, further, to state if the employee was in service on the date of the report; if not, when and why he left the service, and if retired, whether he was receiving a pension or monthly allowance from the carrier.

At the time of the preparation of the present affidavit the returns to the Retirement Board's Order No. 2 and accompanying questionnaire were far from complete and were not available to affiant. Instead of undertaking to reach by statistical calculation a figure as to the total number of persons in the employ of plaintiffs of age seventy or more as of the time of the filing of the bill of complaint in this cause, that is, about August 1, 1934, and whom Section 4 of the Act itself will require to leave the service of plaintiffs permanently February 1, 1935, affiant has preferred to await the comple-

tion of the reports to the defendant Retirement Board pursuant to Order No. 2 in order to secure exact figures, which exact figures will be readily procurable from such returns when complete. Accordingly, for the basis of the statements hereinafter contained in this section of this affidavit, affiant makes an assumption that the completed returns of carriers to the defendant Retirement Board pursuant to its Order No. 2 will show that there were on August 1, 1934, in the employ of the plaintiffs in this cause more than 9,500 persons of age seventy or more, other than those in official positions, whom Section 4 of the Act itself will require to leave the service of plaintiffs permanently February 1, 1935. If the figure involved in this assumption is ultimately varied by the returns to the Board, then the other figures shown by the affiant under this heading of this affidavit will be relatively varied.

The annuities of the employees involved in the foregoing assumption, when retired, will be calculated practically entirely, under the terms and provisions of the Act, on the basis of their average monthly compensation during the eight consecutive years from 1924 to 1931. During those eight years the average compensation of all employees of Class I railroads was $1,675.98 per year, or $139.67 per month. The men to be retired February 1, 1935, under the terms of Section 4 of the Act because 70 years or more of age, being chiefly from the groups of older employees, having longer years of service and more experience and advancement, and being largely from the transportation employees, the highest-paid group of railroad employees, did, as affiant verily believes, receive a higher average compensation than that of all railroad employees, by as much as 25 percent. Accordingly, in affiant's best judgment and opinion, their average monthly compensation for the years indicated was at least as high as $175.00, which would produce, under the terms and provisions of the Act, an average annuity for such men of approximately $990.00 per year.

Assuming that the entire 9,500 such employees remain on the pay rolls of the carriers during the whole of each of the six months from August 1, 1934 (the effective date of the Act), to February 1, 1935 (the date of their retirement), their aggregate contributions to the Railroad Retirement Fund under the Act would be, at the maximum, two percent of $175.00 per month, times six months, times 9,500 employees, or $199,500. Accordingly, in affiant's opinion, the more than 9,500 persons of age seventy above assumed to have been in the employ of plaintiffs on August 1, 1934, and whom Section 4 of the Act itself will require to leave the service of plaintiffs permanently February 1, 1935, will contribute substantially less than $250,000 to the fund.

II

Number of Railroad Employees Discharged from Service for Cause as Found to be Detrimental to the Efficiency or Safety of the Business. Bill of Complaint III, 5, Page 14

The Federal Coordinator of Transportation has recently called upon all Class I carriers to submit to him elaborate reports and statistics as to railroad employment. These reports show, among

other data, the number of employees dismissed from railroad service for cause during the calendar year 1933. Affiant states, upon an examination of these reports in the office of Coordinator, that they show a total of 6,806 employees of Class I carriers were dismissed for cause during said year. In affiant's opinion 1933 was a fairly typical year in this regard, and on the above basis affiant states his opinion that in the ordinary conduct of their businesses the plaintiffs release or dismiss employees from their service from time to time for cause, and because their services are found to be detrimental to the efficiency or safety of the businesses of plaintiffs, and that the number of such persons discharged for cause by plaintiffs annually is approximately 5,000 or more.

III

Number of Employees of Plaintiffs Between 51 and 65 Years of Age Having a Service Period of More than 30 Years. Bill of Complaint V, 1, Page 16

For the facts given under this head affiant again makes reference to the special study, made under his supervision and direction, by the Bureau of Railway Economics in 1932, and based upon returns to questionnaire made to affiant by 129 Class I railroads in the United States, Exhibit A to this affidavit. This special study showed in detail the number of employees of such 129 Class I railway systems, grouped according to attained age and number of years of continuous service. The data included 1,215,897 employees as of 1931. Affiant has this basic data and the tables complied thereon by affiant and the Bureau of Railway Economics in his custody. For purposes of simplification and to avoid attaching as exhibits elaborate statistical calculations, affiant here explains how he has used this study to produce the following figures.

Employees now between 51 and 65 years of age are those born between the years 1870 and 1883, inclusive, while those having thirty or more years of continuous service are those who entered the service in 1904 or prior thereto, and have been since continuously in the service of the same carrier. The study showed, as of the end of 1931, 98,248 employees born between the said years, and having continuous service since 1904, or since prior thereto.

As shown by the official records of the Interstate Commerce Commission, there were 1,164,707 employees of all Class I railways receiving pay in the month of June 1934. A comparison of this number with the above number of 1,215,897 covered by Exhibit A produces a ratio of the former to the latter of 95.8 percent.

Applying this ratio of 95.8 percent to the 98,248 shown by the study, Exhibit A, as having been born between the years 1870 and 1883 and as having continuous service with the same carrier since 1904 or since prior thereto, the result is 94,122 as the number of such employees for all Class I carriers in June 1934. In addition to this number, the Railway Express Agency and The Pullman Company combined have 3,152 such employees, as shown by a special report from those companies as of the present time. The total for all is thus 97,274 employees between 51 and 65 years of age and having

30 years or more continuous service with the same carrier as of June 1934.

This calculation does not make allowance for mortality that may have occurred during the years 1932 to 1934 among said railway employees. On the other hand, in the process of laying off men, the general railway practice is to furlough the younger men with shorter service periods. Because of this practice, it is believed that the greater stability of employment by men with 30 or more years of service has more than offset any decline in the number of this group due to mortality.

Furthermore, the study was compiled on the basis of year of entry into service and subsequent continuous employment with the individual reporting railroad, and does not take into account prior non-continuous service either with present employer or with other carriers. If possible to obtain, such prior service would considerably increase the total of 97,274 employees of such age classifications with 30 or more years' continuous service.

In view of these several factors, affiant states that the present number of employees with 30 or more years of total service and now between 51 and 65 years of age exceeds 100,000.

IV

Railroad Employee 70 Years of Age or Over as Divided Between Employing Carriers. Bill of Complaint VI, Page 18

In the month of July 1934 affiant, as Director of the Bureau of Railway Economics, made as to each of the plaintiffs in this cause a special study as to whether each such plaintiff had at that time any employee seventy years of age or over. This special study was made from the data contained in the table already described in detail in this affidavit and attached as Exhibit A hereto, except that as to 17 plaintiffs not included in such exhibit affiant procured special reports, which are in the custody of affiant. This said special study showed that 56 of the 137 plaintiffs in this cause had at that time no employee seventy years of age or over and that the remaining 81 of the plaintiffs did have one or more such employees.

Taking the list of 56 of the plaintiff companies having no employees seventy years of age or over, and by consulting the official records of the Interstate Commerce Commission, affiant ascertained that the total number of all employees of those 56 plaintiff companies was, in the year 1933, 638,188.

Taking the list of the 81 remaining plaintiffs that did have employees seventy years of age or over, the affiant has ascertained from the records of the Interstate Commerce Commission that those 81 plaintiffs had in 1933 a total number of employees of 376,966.

The total employment for all plaintiffs in 1933, as taken from the same source, was 1,015,154, of which the 638,188 employees of the first-named group of 56 plaintiffs having no employees 70 years of age or over is 62.9 percent, while the 376,966 employees of the second-named group of 81 plaintiffs that had employees 70 years of age or over is 37.1 percent.

V

Railway Companies in the Hands of Receivers or Trustees in Bankruptcy. Bill of Complaint VIII, first paragraph 21

Affiant hereunder sets out two statements, each of which affiant has drawn from the official records of the Interstate Commerce Commission.

The first statement lists the railway companies which were, on August 1, 1934, in the hands of receivers or trustees in bankruptcy. It shows a total of 26 Class I carriers so listed, operating 40,565 miles of railroad. Based upon the same official records of the Interstate Commerce Commission, the grand total of all railroads of all classes, large and small, in the hands of receivers or trustees in bankruptcy, on August 1, 1934, is 62 companies, operating a total of 42,751 miles of railroad.

This statement follows:

Road	Miles of road operated	Date of receivership
Class I roads in receivership:		
Ann Arbor	294	Dec. 4, 1931
Central of Georgia	1,945	Dec. 19, 1932
Chicago, Indpls. & Louisville	647	Dec. 30, 1933
Florida East Coast Ry. Co	839	Sept. 1, 1931
Fort Smith & Western Ry. Co	250	June 1, 1931
Georgia & Florida R. R	484	Oct. 20, 1929
Minneapolis & St. Louis R. R. Co	1,628	July 26, 1923
Missouri & North Arkansas Ry. Co	365	May 5, 1927
Mobile & Ohio R. R. Co	1,240	June 3, 1932
Norfolk Southern R. R. Co	933	July 27, 1932
Pittsburgh, Shawmut & N. R. R. Co	198	Aug. 1, 1908
Seaboard Air Line Ry. Co	4,349	Dec. 23, 1930
Wabash Ry. Co	2,480	Dec. 1, 1931
Total (13 roads)	15,682	
Class I roads in trusteeship:		
Akron, Canton & Youngstown	171	Apr. 4, 1933
Chicago & Eastern Illinois	939	Apr. 19, 1933
Chicago, Rock Island & Gulf	722	Oct. 24, 1933
Chicago, Rock Island & Pacific	7,611	June 7, 1933
Gulf Coast Lines:		
Beaumont, Sour Lake & Western	146	July 1, 1933
New Orleans, Texas & Mexico	191	July 1, 1933
San Antonio, Uvalde & Gulf	317	July 1, 1933
St. Louis, Brownsville & Mexico	631	July 1, 1933
International-Great Northern	1,160	July 1, 1933
Missouri-Illinois	202	July 1, 1933
Missouri Pacific	7,412	July 1, 1933
St. Louis-San Francisco Ry	5,267	Nov. 1, 1932
Spokane International Ry. Co	184	Aug. 28, 1932
Total (13 roads)	24,933	
Total class I roads in receivership or trusteeship (26 roads)	40,565	
Class II roads in receivership:		
Apache Ry. Co	72	Oct. 1, 1931
Apalachicola Northern	99	May 29, 1932
Boyne City, Gaylord & A. R. R. Co	93	Nov. 21, 1931
Chicago, Attica & S. R. R. Co	155	Aug. 5, 1931
Chicago, Springfield & St. L. Ry. Co	87	Jan. 24, 1930
Gainesville & Northwestern R. R. Co	38	Nov. 21, 1923
Gainesville Midland Ry	74	Feb. 15, 1921
Georgia S. W. & G. R. R. Co	38	Jan. 2, 1933
Jacksonville & Havanna R. R. Co	60	Feb. 1, 1930
Louisiana Southern Ry. Co	39	Aug. 2, 1933
Nevada Copper Belt R. R. Co	41	Apr. 3, 1928
North & South Ry. Co	41	Aug. 1, 1934
Ohio & Kentucky Ry. Co	40	Dec. 2, 1931
Peoria Terminal	15	Oct. 24, 1933

Road	Miles of road operated	Date of receivership
Class II roads in receivership—Continued.		
Raleigh & Charleston R. R. Co.	43	May 1, 1931
Rio Grande Southern R. R. Co.	174	Dec. 16, 1929
Sandy River & Rangeley Lakes R. R.	55	July 8, 1923
Santa Fe, San Juan & Northern R. R.	57	Oct. 14, 1931
Savannah & Atlanta Ry.	147	Mar. 4, 1921
Sierra Ry. Co. of California	79	May 5, 1932
Tallulah Falls Ry. Co.	57	June 25, 1923
Tonopah & Goldfield	102	July 20, 1932
Waco, Beaumont, Trinity & Sabine Ry.	115	Feb. 8, 1930
Wichita Northwestern Ry. Co.	99	Nov. 10, 192
Total (24 roads)	1,835	
Class II roads in trusteeship:		
Fonda, Johnstown & Gloversville	64	Apr. 20, 1933
Meridian & Bigbee River Ry. Co.	30	May 31, 1933
Minarets & Western	53	——— —, 1933
Total (3 roads)	147	
Total Class II roads in receivership or trusteeship (27 roads)	1,982	
Class III roads in receivership:		
Alabama, Florida & Gulf R. R. Co.	29	Jan. 29, 1930
California & Oregon Coast R. R. Co.	15	Feb. 19, 1925
Cape Girardeau Northern Ry. Co.	13	Apr. 14, 1931
Chesterfield & Lancaster R. R. Co.	33	Apr. 15, 1931
Colorado-Kansas Ry. Co.	23	July 1, 1931
Pittsburgh & Susquehanna R. R. Co.	18	Apr. 22, 1931
Rutland, Toluca & Northern R. R. Co.	21	Mar. 16, 1931
Shelby Northwestern Ry. Co.	22	Sept. 15, 1932
Wilmington, Brunswick & Southern R. R.	30	Mar. 18, 1933
Total (9 roads)	204	
Grand total all operating roads	42,731	

The following statement shows the railway mileage in the hands of receivers, as reported by the Interstate Commerce Commission, for each year from the low point of the depression period of 1893 and following to the year 1933, inclusive:

Railways in the hands of receivers, all railways, years 1894 to 1933

Years ended—	Miles of road operated
June 30, 1894	40,818.81
1895	37,855.80
1896	30,475.39
1897	18,861.68
1898	12,744.95
1899	9,853.13
1900	4,177.91
1901	2,497.14
1902	1,475.32
1903	1,185.45
1904	1,323.28
1905	795.82
1906	3,971.43
1907	3,926.31
1908	9,529.03
1909	10,529.80
1910	5,257.03
1911	4,592.89
1912	9,785.83
1913	16,286.18
1914	18,608.21
1915	30,223.05
1916	37,353.45

Years ended—Continued	Miles of road operated
Dec. 31, 1916	34,803.59
1917	17,375.51
1918	19,207.58
1919	16,589.76
1920	16,290.17
1921	13,512.35
1922	15,259.11
1923	12,623.24
1924	8,105.24
1925	18,686.99
1926	17,631.55
1927	16,751.88
1928	5,255.54
1929	5,702.92
1930	9,486.28
1931	12,970.12
1932	22,545.14
1933	42,246.30

The railway mileage in receivership or in the hands of trustees in bankruptcy in 1933 was greater than in any previous year of record, and was greater even than during the depression of the early nineties.

VI

Ratio of 134 Plaintiff Roads to All Railways in the United States, 1933. Bill of Complaint VIII, Second Paragraph, on Page 21

Affiant has taken the statistics contained in the following table from official records of the Interstate Commerce Commission, as follows: Items 1 and 2 from annual reports by carriers to the Interstate Commerce Commission, calendar year 1933; items 4 and 5 from Interstate Commerce Commission Statistics of Railways in the United States, year 1932, statement No. 53, pp. S–91 and S–92. The statement shows the number of employees, total employee compensation, and total operating revenues of all Class I railroads in the United States, 151 in number, compared with the same data for the 134 Class I railroads which are plaintiffs in this cause. The statement shows the respective ratios of plaintiff totals to the totals for all Class I railroads as set out in item 3. The ratio of the totals of all Class I railroads to the totals of all railroads is set out in item 6. Item 7 shows the percentage ratios of plaintiff totals to the totals of all railroads as follows: Number of employees, 93.3%; total compensation paid, 97.9%; total operating revenues, 98.0%. This statement is as follows:

Ratio of 134 plaintiff roads to all railways, United States, 1933

Item	Average number of employees	Total compensation	Total operating revenues
1. Total (151) all Class I roads	971,196	$1,403,840,833	$3,096,403,900
2. Total (134) plaintiff Class I roads	963,601	1,394,113,894	3,078,184,508
3. Per cent of all Class I roads (2÷1)	99.2	99.3	99.3
4. Total all railways—Year 1932	1,032,000	1,435,000,000	3,168,837,000
5. Total Class I roads—Year 1932	1,031,703	1,512,816,147	3,139,780,134
6. Percent Class I roads of all railways—1932—(3÷4)	98.07	98.55	98.08
7. Percent Class I plaintiff roads of all railways—(3×6)	97.3	97.9	98.0

VII

Class I Railroads Having a Deficit in Net Railway Operating Income 1932, 1933, and Six Months 1934. Bill of Complaint VIII, Third Paragraph, Page 21

Affiant shows that all of the statistical tables set out under this head are based on official reports of the carriers to the Interstate Commerce Commission. The first statement is a complete list of the 55 carriers which in 1932 failed to earn their operating expenses and taxes, and shows their aggregate deficit for that year to have been $25,474,369. This statement is as follows:

List of 55 class I roads, being those which reported a deficit in net railway operating income for the calendar year 1932

Road	Average miles operated	Net Railway operating deficit
Eastern district:		
Atlantic City	164.20	$569,205
Bessemer & Lake Erie	226.01	1,118,701
Can. Nat. Lines in New Eng.	172.21	906,194
Canadian Pac. (Lines in Me.)	233.73	350,721
Canadian Pac. (Lines in Vt.)	85.40	448,412
Chicago & Eastern Illinois	938.89	1,283,337
Chicago, Ind. & Louisville	644.59	111,763
Elgin, Joliet & Eastern	447.06	1,016,847
Grand Trunk Western	1,022.42	2,031,098
New Jersey & New York	45.72	263,251
Pittsburg, Shawmut & Northern	197.83	45,515
Staten Island Rapid Transit	23.54	9,762
Ulster & Delaware *	128.88	27,598
Total 13 roads	4,330.50	8,182,474
Southern district:		
Alabama Great Southern	315.14	128,806
Atlanta & West Point	93.24	323,419
Atlanta, Birmingham & Coast	639.42	892,921
Central of Georgia	1,944.65	271,616
Columbus & Greenville	167.70	81,955
Florida East Coast	838.83	281,776
Georgia & Florida	463.61	200,099
Gulf & Ship Island	307.74	280,280
Gulf, Mobile & Northern	733.92	132,335
Mississippi Central	150.06	67,472
Mobile & Ohio	1,225.52	509,802
New Orleans & Northeastern	204.05	415,740
Norfolk Southern	932.66	270,501
Northern Alabama	99.79	60,209
Western Ry. of Alabama	133.42	151,163
Total 15 roads	8,269.75	4,025,096
Western district:		
Beaumont, Sour Lake & Western	146.16	156,149
Burlington-Rock Island	302.66	109,284
Chi., Milwaukee, St. Paul & Pac.	11,262.50	518,116
Chi., St. Paul, Minpls. & Omaha	1,736.94	10,892
Colorado & Southern	1,031.81	65,381
Duluth, Missabe & Northern	563.87	2,524,823
Duluth, S. Shore & Atlantic	560.00	567,046
Duluth, Winnipeg & Pacific	178.87	53,063
Fort Smith & Western	249.75	62,238
Fort Worth & Rio Grande	233.46	406,885
Lake Superior & Ishpeming	160.39	342,443
Louisiana, Arkansas & Texas	255.84	38,704
Minneapolis & St. Louis	1,627.80	386,105
Minnpls., St. Paul & S. S. Marie	4,348.01	1,547,931
Missouri & North Arkansas	354.82	132,735
Mo.-Kansas-Texas of Texas	1,390.21	941,977
Nevada Northern	165.87	34,224
Northwestern Pacific	441.19	346,712
Oklahoma City-Ada-Atoka	132.43	43,834
Oregon-Washington R. R. & Nav. Co.	2,336.10	1,370,308

* Represents combined returns for the corporation and receiver for the month of January 1932. Property acquired by New York Central R. R. Co.

List of 55 class I roads, being those which reported a deficit in net railway operating income for the calendar year 1932—Continued

Road	Average miles operated	Net Railway operating deficit
Western district—Continued.		
St. Louis, San Francisco & Texas	262.02	$449,275
St. Louis Southwestern of Texas	806.31	1,029,169
San Antonio, Uvalde & Gulf	316.92	113,504
San Diego & Arizona [1]	155.30	472,342
Spokane International	163.58	135,274
Texas & New Orleans	4,613.16	1,343,061
Texas Mexican	162.04	67,214
Total, 27 roads	33,958.01	13,266,889
Grand total, 55 roads	46,538.35	25,474,369

[1] Now the San Diego and Arizona Eastern.

The next statement lists the 34 carriers which in 1933 failed to make their operating expenses and taxes and shows that their aggregate operating deficit was $9,655,279. The statement is as follows:

Road	Average miles operated	Net railway operating deficit
Eastern district:		
Canadian National Lines in N. E.	172.21	$815,522
Canadian Pacific (lines in Me.)	233.73	108,473
Canadian Pacific (lines in Vt.)	85.40	397,753
Chi., Indpls. & Louisville	646.84	21,083
Grand Trunk Western	1,005.56	954,401
New Jersey & New York	45.72	334,357
Penna.-Reading Seashore Lines [1]	329.90	1,504,070
Total 7 roads	2,519.36	4,135,659
Southern district:		
Atlanta & West Point	93.24	231,983
Atlanta, Birmingham & Coast	639.41	250,846
Florida East Coast	839.14	134,910
Georgia & Florida	465.02	21,191
Gulf & Ship Island	307.74	160,504
Mississippi Central	150.06	20,494
New Orleans & Northeastern	204.05	182,615
Western Ry. of Alabama	133.42	84,879
Total 8 roads	2,832.08	1,087,422
Western district:		
Beaumont, Sour Lake & Western	146.06	220,610
Burlington-Rock Island	280.24	37,376
Chicago, Rock Island & Gulf	721.98	291,716
Fort Smith & Western	249.75	4,895
Fort Worth & Rio Grande	233.46	393,538
Gulf, Colorado & Santa Fe	1,948.16	85,154
Louisiana, Arkansas & Texas	255.84	1,842
Missouri-Kansas-Texas of Texas	1,390.21	1,235,681
Nevada Northern	165.87	36,497
Northwestern Pacific	400.94	180,606
Oklahoma City-Ada-Atoka	132.43	21,665
Oregon-Washington R. R. & Nav. Co.	2,303.76	392,843
St. Louis, San Francisco & Texas	261.29	354,114
St. Louis Southwestern of Texas	787.45	582,453
San Antonio, Uvalde & Gulf	316.92	124,865
San Diego & Arizona Eastern	155.38	61,946
Spokane International	163.58	97,804
Texas & New Orleans	4,505.87	192,443
Texas Mexican	162.04	116,153
Total 19 roads	14,561.23	4,432,198
Grand total 34 roads	19,932.67	9,655,279

[1] Includes Atlantic City and a portion of West Jersey & Seashore, operated by Pennsylvania Railroad prior to June 25, 1933.

The third statement lists the 33 carriers which in the first six months of 1934 (Jan. 1 to June 30 inclusive) failed to earn their operating expenses and taxes, and shows that their aggregate operating deficit was $6,369,965. The statement is as follows:

Road	Average miles operated	Net railway operating deficit
Eastern district:		
Canadian National Lines in New Eng	172.21	$396,605
Canadian Pacific (lines in Vt.)	85.40	227,124
Central Vermont	455.59	38,273
Chicago, Indpls. & Louisville	644.36	271,767
New Jersey & New York	45.72	206,806
Penna.-Reading Seashore Lines	412.99	1,186,556
Rutland	413.03	6,233
Staten Island Rapid Transit	23.54	44,536
Total 8 roads	2,252.84	2,377,902
Southern district:		
Atlanta & West Point	93.24	71,947
Atlanta, Birmingham & Coast	639.37	189,115
Columbus & Greenville	167.70	7,196
Georgia & Florida	465.49	19,112
Gulf & Ship Island	261.68	46,167
Western Ry. of Alabama	133.42	33,547
Total 6 roads	1,760.90	337,084
Western district:		
Beaumont, Sour Lake & Western	146.06	34,311
Burlington-Rock Island	280.24	128,093
Chicago, Rock Island & Gulf	727.98	105,340
Colorado & Southern	1,029.61	182,837
Duluth, Missabe & Northern	563.74	412,805
Duluth, Winnipeg & Pacific	178.87	1,272
Fort Smith & Western	249.75	24,824
Fort Worth & Rio Grande	233.46	149,130
Green Bay & Western	233.98	21,728
Gulf, Colorado & Santa Fe	1,918.15	1,067,491
Minneapolis & St. Louis	1,027.23	219,289
Minneapolis, St. Paul & S. S. Marie	4,304.30	81,811
Northwestern Pacific	385.99	83,992
Oregon-Washington R. R. & Nav. Co	2,295.49	148,080
St. Louis, San Francisco & Texas	281.29	241,839
Southern Pacific S. S. Lines		384,908
Spokane International	163.56	34,186
Texas & New Orleans	4,477.88	257,429
Utah Railway	111.10	77,532
Total, 19 roads	19,182.70	3,664,979
Grand total, 33 roads	23,196.44	6,369,965

VIII

Railway Property Value and Rate of Return, Bill of Complaint VIII, fourth paragraph, page 21

In hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives of the Seventy-second Congress, First Session, on H. R. 7116 and 7117, a Bill to amend Section 15a of the Interstate Commerce Act, and for Other Purposes, as shown by the official report of said hearings, see page 2 et sequitur and pages 356 to 358, Honorable Joseph B. Eastman, then and now a Commissioner of the Interstate Commerce Commission, and now also Federal Coordinator of Transportation, appeared before the Committee representing the Interstate Commerce Commission and presented its conclusions and recommendations as to the amendment of Section 15a of the Interstate Commerce Act, as to the recapture

clause and the rule of rate making, and of Section 19a of the said Act, as to valuations. In connection with his presentation he submitted a statement covering all of the Class I steam railways of the United States, showing the net railway operating income, investment, Interstate Commerce Commission primary and 1920 rate-case values, and rates of return, by rate groups, for the years 1921 to 1931.

This statement presented, among others, one basis of valuation as to which Mr. Eastman said, see page 357 of the above reference:

"The second base is our primary valuations under section 19a brought down to date by adding subsequent net additions and betterments at cost, which is practically the O'Fallon method. That shows the largest return of all."

Affiant has taken these primary valuations, so presented by the said representative of The Interstate Commerce Commission, as to Class I carriers, and, by the application of the same method shown in the Commission's statement there submitted, has extended these primary valuation figures down to 1932 and 1933, producing the following approximate results:

1932	$22,074,000,000
1933	21,800,000,000

Net railway operating income, according to the accounting classification of the Interstate Commerce Commission, is what is left of operating revenues after operating expenses and taxes but before interest on bonds and other fixed charges have been paid.

Affiant has ascertained from the official statistics of the Interstate Commerce Commission the respective totals of the net railway operating incomes of Class I carriers in 1932 and in 1933, and by applying those totals to the total primary valuations above set out has ascertained that on the basis of those primary valuations the Class I carriers of the United States in 1932 earned a rate of return of only 1.48 percent and in 1933 earned a rate of return of only 2.18 percent. Affiant further states that if, instead of taking as a base of valuation the said primary values, there should be taken either of the other bases of value set out in the said statement submitted by Mr. Commissioner Eastman, to wit, the investment account basis, or the 1920 rate-case valuation for the roads as a whole, the said total net railway operating incomes for the said years of 1932 and 1933 would represent considerably lower rates of return than those stated above.

IX

Increased Operating Costs Due to Restoration of Wage Reductions, Bill of Complaint VIII, Last Paragraph Beginning on Page 21 and Ending on Page 22

Affiant shows that negotiations between a committee of nine railway presidents, representing the carriers, and the Railway Labor Executives' Association, comprising twenty labor groups, which were terminated on January 31, 1932, resulted in an agreement for a voluntary deduction from standard rates of pay. The agreement became effective on February 1, 1932, and remained in effect for one year.

Affiant further shows that said agreement provided that 10 percent should be deducted from each pay check of each of the employees

covered by the agreement during the year ending January 31, 1933, but that basic rates of pay should remain unchanged.

The agreement was extended by said parties in December 1932 for another period of nine months, beginning with February 1 and ending with October 31, 1933. The agreement was again extended by said parties in June 1933 for an additional period of eight months, or from November 1, 1933, to June 30, 1934.

Affiant further shows that in February 1934 agreement was reached between carriers and said labor organizations whereby employees would receive a 2½-percent restoration, effective July 1, 1934, an additional 2½-percent restoration on January 1, 1935, and the remaining 5 percent, completing the restoration of the whole 10 percent deducted under said agreements and extensions of February 1, 1932, February 1, 1933, and November 1, 1933, on April 1, 1935.

The following statistical statement is a calculation of the annual effect of the successive restorations in pay outlined above, aggregating 10 percent. Basing the calculation on the estimated employment for the year 1934, the annual increase in pay-roll expense to the carriers will be a minimum of $164,057,000; including the Pullman Company and the Railway Express Agency, Inc. (which were included in the agreement already described), the minimum increase in annual pay-roll expense will exceed $165,000,000.

The following statement, above referred to, is based on: Item 1, Interstate Commerce Commission monthly reports of wage statistics, Class I steam railways; item 2, annual reports of carriers to Interstate Commerce Commission; item 4, estimated on the basis of an increase in pay rolls for 1934 over 1933 of 10 percent. Employment and pay-roll figures for the first six months of 1934, compared with the corresponding period of 1933, showed an increase of 7.6 percent in number of men, 12.92 percent in hours worked, and 12.4 percent in total compensation. The statement is as follows:

Effect on annual railway pay roll of restoration of 10 percent. Deduction in basic rates of pay. Railways of class I—United States

Calculated on employment of calendar year 1933:	
1. Compensation to employees—total	$1,403,881,864
2. Compensation—excluding executives, officials, and staff assistants	1,342,013,469
3. Annual effect of 10-percent restoration in wages, based on 1933 pay roll (1/9 of item 2)	149,113,000
Calculated on estimated employment for 1934:	
4. Annual effect of 10-percent restoration in wages, based on 1934 pay roll	
5. Minimum, calculated on pay roll, excluding executives, officials, and staff assistants	164,057,000
6. Maximum, calculated on total pay roll	171,600,000

X

Increase in Operating Costs Due to Increased Prices of Materials and Supplies. Bill of Complaint VIII, Last Part of Last Paragraph, Beginning Bottom Page 21 and Ending Top Page 22

The following statistical statement shows the annual increase in the cost of fuel and other materials and supplies to the carriers, due

to increased prices since the month of May 1933 when the present upward trend in prices began. Sources of the information are noted at the foot of the statement.

The total annual increase to Class I carriers, based on the rate of consumption or use in 1934, is $138,305,000. To this should be added the large increases experienced by the Pullman Company and the Railway Express Agency, Inc. Making allowance for this addition, and also for the fact that not all the price increases were fully effective from the first of the year 1934, a reasonable estimate of the total increase in material costs applicable to 1934 is not less than $125,000,000. The statement is as follows:

Increase in material costs—Class I Railways in the United States

Material classification railway purchases in 1933	Purchases during 1933	Weighted percent increase in material costs [1]	Increase in material costs
		Percent	
Fuel:			
Bituminous coal (39 and 40)	$148,650,000	26.2	$39,601,000
Anthracite coal (39 and 40)	2,633,000		
Fuel oil (39 and 40)	24,850,000	22.2	5,521,000
All other fuel (27, 39, and 40)	4,393,000	17.2	757,000
Total fuel	180,526,000	25.4	45,879,000
Forest products—Total	42,442,000	37.2	15,785,000
Iron and steel products—Total	110,720,000	6.3	6,938,000
Miscellaneous—Total	132,162,000	14.1	18,674,000
Grand total purchases—1933	465,850,000	18.7	87,276,000
Total consumption of materials charged operating expenses—1933	669,196,000	18.7	125,185,000
Estimated increased material costs for 1934 [2]			138,305,000

[1] "Weighted percent increase in material costs" calculated from a special questionnaire filed by carriers representing 85 percent of total expenses of all railways of Class I in the United States. The percentages represent the weighted increase in the latest (February 28, 1934) quoted or N. R. A. code prices available as compared with prices in effect in May 1933, except for fuel oil and coal. The price increases on fuel coal and oil are based on carriers' reports to the Interstate Commerce Commission (Form O8-E).

[2] "Estimated increase in material costs for 1934" estimated greater than for 1933, due to increased material consumption by 10.5 percent. Total operating expenses, exclusive of pay roll and depreciation and retirements charges, showed an actual increase for the first six months of 1934, over the corresponding period of 1933, of 20.82 percent.

XI

Effect of Increases in Labor Costs and Costs of Materials and Supplies on Net Railway Operating Income for Year 1934. Bill of Complaint VIII, First Paragraph, Beginning on Page 22

Affiant shows that net railway operating income of Class I carriers of the United States during the first four months of 1934, January 1 to April 30, showed an increase over the corresponding four months of 1933. The principal reasons for said increase were (*a*) an increase in freight traffic; (*b*) the fact that the restoration in rates of pay to employees, which is described at another point in this affidavit as agreed upon to begin July 1, 1934, had not then become effective; (*c*) the fact that the full effect of the increase in cost of railroad materials, due to increased and increasing prices of materials and supplies, had not yet been felt.

Beginning with May 1, 1934, and continuing from that time to the latest month for which statistics are available at the time of the execution of this affidavit, the net railway operating income of Class I carriers has continuously and increasingly declined, compared with the corresponding months of 1933, as set out below:

In May 1934 a decline of 3.8 percent under May 1933.

In June 1934 a decline of 30.1 percent under June 1933.

In July 1934 a decline of 45.6 percent under July 1933.

Beginning with July 1, 1934, the partial restoration of employee rates of pay has been effective. Since said date, in addition, there has been a continuous decline in freight traffic compared with the corresponding periods of 1933. Further, the effect of increased prices of materials and supplies has, since said date, become more comprehensively and fully realized by the carriers.

In view of the declining trend in net railway operating income already experienced by the carriers since May 1, 1934, and in view of the increasingly burdensome effect of the operating factors described above, to wit, declining traffic, increased rates of pay to employees, and increased cost of materials and supplies, affiant verily believes that the downward trend in net railway operating income during the months of May, June, and July 1934 will continue in the same direction to the end of the year 1934, and that the aggregate net railway operating income for the year 1934 as a whole will be substantially less than that of the year 1933.

XII

Distribution of Commercial Freight and Passenger Traffic Between Railroads and Other Transportation Agencies, 1932. Bill of Complaint VIII. Second Paragraph Beginning on Page 22

Affiant takes the following statement from the report of the Federal Coordinator of Transportation on "Regulation of Transportation Agencies", Seventy-third Congress, Second Session, Senate Document No. 152, page 3.

Distribution of commercial freight traffic, calendar year 1932

	Short tons	Percent of total	Ton miles	Percent of total
Steam railroads	678,854,000	83.9	235,308,521,000	73.9
Great Lakes	30,544,000	3.1	24,733,878,000	7.8
Pipe lines (petroleum)	80,029,000	6.3	19,000,000,000	6.2
Intercity trucks	200,708,000	23.8	30,076,800,000	9.4
Inland Waterways	151,276,000	12.0	7,904,910,000	2.5
Electric railways and airplanes	11,661,000	.9	583,260,000	.2
Total		100.0		100.0

Of the total ton-miles included by the coordinator in his table, 73.9 percent is assigned to steam railroads, and the remaining 23.1 percent to motor carriers, water carriers, and other competing agencies of transportation.

The following statement showing the distribution of commercial passenger traffic for the calendar year 1932 as between railways and other transportation agencies is taken from sources shown.

Distribution of commercial passenger traffic, calendar year 1932

	Passenger-miles	Percent distribution
Railways (Class I) *a*	16,971,000,000	64.5
Airplanes (domestic) *b*	127,000,000	0.5
Buses (intercity) *c*	6,300,000,000	24.0
Water *d*	2,900,000,000	11.0
Total	26,298,000,000	100.0

The railways hauled 64.5 percent of the commercial passenger traffic in 1932, while motor carriers, water carriers, and other competing agencies of transportation handled the remaining 35.5 percent.

a. Interstate Commerce Commission, Statistics of Railways in the United States, 1932, Statement No. 55, page S–10, line 70.

b. Air Commerce Bulletin, United States Department of Commerce, March 1934, page 249.

c. National Automobile Chamber of Commerce, Facts and Figures of the Automobile Industry, 1933 edition, page 76.

d. Number of passengers—Chief of Engineers of United States Army Annual Report, II, 1933, page 32.

Great Lakes total	12,259,186	
Less ferry	2,369,894	
		9,889,292
Rivers and canals	21,088,277	
Less ferry	12,170,910	
		8,917,367
Total		18,806,659

Passenger miles are calculated at 200 per passenger on the Great Lakes; 100 per passenger on rivers and canals.

XIII

Comparison of Average Ages Between Railroad Employees and Labor Representatives

Upon the basis of the 1932 study of 129 Class I railroads, Exhibit A, affiant has ascertained that the average age of the 1,215,897 employees of those railroads was 42.99 years.

These railroads are such a large proportion of all Class I railroads and have such a large proportion of all employees of Class I railroads that affiant is certain that the average age of all employees of all Class I railroads of the United States cannot be substantially different from the above figure.

This average age of employees is compared with the average age of 51 years 3 months of representatives of labor organizations, shown in the affidavit of Edgar J. McClees, filed in this cause.

XIV

Net Income or Deficit After Fixed Charges of Class I Carriers, 1932, 1933, and Six Months 1934

The affiant has taken from the official records of the Interstate Commerce Commission, the reports of Class I railroads, the following tables showing the net income or net deficit of each of the Class I railroads, after fixed charges, and before any payments of dividends, for the year 1932, the year 1933, and the first six months of 1934, respectively.

Net income after fixed charges is shown in black and net deficit after fixed charges is shown in red.

JULIUS H. PARMELEE,
(Affiant)
Director, Bureau of Railway Economics,
(Title)
Transportation Bldg., Washington, D. C.
(Address)

Subscribed and sworn to before me this 17th day of September 1934.

[SEAL] MARY T. KINNEY,
Notary Public.

My Commission expires October 3, 1938.

Plaintiffs' Exhibit 2

AFFIDAVIT

Filed Oct. 11, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

JULIUS H. PARMELEE, being first duly sworn, deposes and says that he is the same Julius H. Parmelee who has already made an affidavit for use in the above-entitled cause and he has the same experiences and qualifications therein recited. He makes this affidavit with knowledge that it is to be used in said cause.

At the request of the Committee of Counsel representing the plaintiffs in this cause, the affiant, on August 31, 1934, addressed to the Chief Executive of each of the plaintiffs in the above-entitled action a letter enclosing two questionnaires and a set of instructions for responding to the first of said questionnaires, a true copy of which said letter, together with all the said enclosures, is hereto attached and marked Exhibit A.

The first of said questionnaires called for a report by each said company showing the number of employees receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof, and provided for said report to be made and divided under sixteen heads describing classes of duties in which said employees were exclusively engaged, together with total of all reported under all such classes. The memorandum of instructions, or the formulae to be followed in preparation of answers to the said questionnaire, was prepared by

NET INCOME OR DEFICIT AFTER FIXED CHARGES

Railways of Class I - 1932, 1933, 1934 (6 months)

Company	1932 (Deficits in red)	1933 (Deficits in red)	1934 (6 months) (Deficits in red)
Akron, Canton & Youngstown	857 598	1118 327	876 173
Alton R.R.	1 259 705	43 251	911 184
Ann Arbor	411 761	226 032	20 047
Atchison, Topeka & Santa Fe System	2 410 306	2 153 569	1 166 402
Atlanta & West Point (Incl.W.Ry.of Ala.)	469 124	323 228	109 307
Atlantic, Birmingham & Coast	801 898	223 374	149 455
Atlantic Coast Line (Incl.Charleston & W.Caro.)	6 785 778	2 232 877	1 287 666
Baltimore & Ohio	6 334 978	204 772	2 400 706
Bangor & Aroostook	701 493	993 576	884 403
Bessemer & Lake Erie	1 920 293	1 373 623	27 278
Boston & Maine	800 660	321 571	568 848
Burlington-Rock Island	855 735	753 097	498 783
Cambria & Indiana	819 128	916 517	401 214
Canadian National Lines in New England	89 619	27 739	678 261
Canadian Pacific (lines in Maine)	269	-	-
Canadian Pacific (lines in Vermont)	-	-	-
Central of Georgia	3 341 676	2 669 565	1 468 076
Central R.R.of New Jersey	1 828 083	2 309 738	7 376
Central Vermont	944 053	875 468	651 162
Chesapeake & Ohio (Incl.Hocking Valley)	23 527 755	28 239 810	13 976 822
Chicago & Eastern Illinois	3 411 419	2 020 504	991 762
Chicago & Illinois Midland	434 578	321 224	2 132
Chicago & North Western (Incl.C.St.P.M.& O.)	24 081 054	8 935 644	6 746 709
Chicago, Burlington & Quincy System	882 923	5 067 446	889 324
Chicago Great Western	1 346 905	514 825	614 168
Chicago, Indianapolis & Louisville	4 594 813	1 514 467	1 040 358
Chicago, Milwaukee, St.Paul & Pacific	23 269 678	14 412 141	8 734 700
Chicago, Rock Island & Pacific (Incl.C.R.I.& G.)	9 956 801	11 602 847	7 046 233
Clinchfield R.R.	-	-	60 447
Columbus & Greenville	85 659	85 493	9 459
Delaware & Hudson	4 477 591	3 699 772	1 035 450
Delaware, Lackawanna & Western	2 542 447	2 993 862	180 964
Denver & Rio Grande Western	2 584 210	2 138 953	1 650 993
Denver & Salt Lake	3 946	4 148	97 747
Detroit & Mackinac	16 193	25 012	30 463
Detroit & Toledo Shore Line	271 319	503 599	452 553
Detroit, Toledo & Ironton	299 498	342 361	909 784
Duluth, Missabe & Northern (Incl.D.& I.R.)	2 956 212	10 684 914	1 110 674
Duluth, South Shore & Atlantic	1 493 525	991 489	405 885
Duluth, Winnipeg & Pacific	10 368	106 786	246 988
Elgin, Joliet & Eastern	2 441 907	532 148	44 136
Erie R.R. (Incl.Chgo.& Erie)	3 142 997	531 529	881 335
Florida East Coast	3 316 630	3 185 635	527 212
Fort Smith & Western	167 942	284 814	171 247
Georgia R.R.	456 125	144 328	123 714
Georgia & Florida	774 512	618 310	324 805
Grand Trunk Western	5 404 179	3 866 678	281 803
Great Northern	13 405 439	3 187 760	4 475 436
Green Bay & Western	112 276	93 732	28 732
Gulf & Ship Island	356 433	235 147	83 136
Gulf Coast Lines	1 297 301	2 043 692	390 631
Gulf, Mobile & Northern	542 694	$ 55 711	$ 29 525
Illinois Central (Incl.Y.& M.V.)	3 546 574	113 861	1 780 934
Illinois Terminal	679 956	260 853	229 061
International-Great Northern	2 427 332	1 285 393	74 274
Kansas City Southern (Incl.T.& Ft.S.)	1 380 761	1 244 545	547 690
Kansas, Oklahoma & Gulf	266 120	303 130	213 442
Lake Superior & Ishpeming	286 853	796 993	41 089
Lehigh & Hudson River	181 593	214 941	107 646
Lehigh & New England	432 041	300 338	235 598
Lehigh Valley	1 933 043	2 775 833	319 106
Long Island	2 999 648	2 243 258	172 726
Louisiana & Arkansas	27 525	151 187	97 882
Louisiana, Arkansas & Texas	102 995	76 723	18 547
Louisville & Nashville (Incl.L.N.& St.L.)	2 109 875	1 795 716	2 097 052

* 9888-O U.S. GOVERNMENT PRINTING OFFICE : 1934

NET INCOME OR DEFICIT AFTER FIXED CHARGES

Railways of Class I - 1932, 1933, 1934 (6 months)

Company	1932 (Deficits in red)	1933 (Deficits in red)	1934 (6 months) (Deficits in red)
Maine Central	$416 125	$19 285	$303 639
Midland Valley	26 925	57 539	9 813
Minneapolis & St.Louis	3 410 486	2 745 626	1 693 921
Minneapolis,St.Paul & S.S.Marie	5 516 465	4 821 146	3 061 914
Mississippi Central	178 102	137 974	57 858
Missouri & North Arkansas	382 846	199 323	100 468
Missouri-Illinois	131 139	103 046	13 988
Missouri-Kansas-Texas (Incl.M-K-T of Tex.)	3 470 157	4 305 005	1 422 340
Missouri Pacific	10 260 861	13 054 477	6 281 267
Mobile & Ohio	2 277 427	1 548 892	809 740
Monongahela	311 629	318 331	213 601
Montour	673 451	729 808	319 470
Nashville,Chattanooga & St.Louis	434 185	292 326	46 147
Nevada Northern	5 636	21 670	23 521
New Jersey & New York	309 128	180 729	231 182
New Orleans Great Northern	373 154	[a]	[a]
New York Central System	16 916 077	2 847 264	108 201
New York,Chicago & St.Louis	4 410 434	1 205 636	413 343
New York Connecting	181 745	11 875	72 659
New York,New Haven & Hartford	292 047	4 851 842	1 424 674
New York,Ontario & Western	777 593	372 583	1 329
New York,Susquehanna & Western	242 476	416 881	53 081
Norfolk & Western	16 984 375	22 479 409	10 615 481
Norfolk Southern	1 103 406	522 114	71 096
Northern Pacific	1 991 406	303 779	2 478 341
Northwestern Pacific	1 629 328	1 624 504	802 200
Oklahoma City-Ada-Atoka	121 122	108 640	35 120
Pennsylvania R.R.	13 573 536	19 281 169	9 972 008
Pennsylvania-Reading Seashore Lines	-	1 999 642	1 633 801
Pere Marquette	2 044 511	1 599 471	515 175
Pittsburg & Shawmut	180 486	144 613	121 353
Pittsburgh & West Virginia	433 530	106 106	41 011
Pittsburg,Shawmut & Northern	751 607	614 691	45 227
Reading Company	3 559 189	6 715 523	3 775 212
Richmond,Fredericksburg & Potomac	389 341	292 320	273 441
Rutland	41 460	70 323	186 554
St.Louis-San Francisco System	9 997 468	10 179 036	4 847 970
St.Louis Southwestern (Incl.St.L.S.W.of Tex.)	3 471 325	2 536 894	444 272
San Diego & Arizona Eastern	1 110 350	143 124	9 700
Seaboard Air Line	9 528 134	6 540 604	2 991 082
Southern Pacific Co.(Incl.T.& N.O.)	14 210 639	12 209 361	2 506 477
Southern Ry. System	12 103 387	715 390	218 835
Spokane International	592 114	365 676	167 870
Spokane,Portland & Seattle	3 630 652	2 334 902	1 057 675
Tennessee Central	82 260	17 552	23 057
Texas & Pacific	92 710	103 758	295 679
Texas Mexican	234 867	287 483	26 614
Toledo,Peoria & Western	11 474	120 290	5 901
Union Pacific	20 859 569	22 040 097	6 737 201
Utah Ry.	16 518	144 090	187 862
Virginian	2 074 399	2 956 652	1 520 596
Wabash	6 673 695	4 823 058	1 401 744
Western Maryland	612 893	936 051	537 936
Western Pacific	2 230 177	2 087 808	1 040 971
Wheeling & Lake Erie	435 084	1 065 050	751 643
Wichita Falls & Southern	56 637	44 765	33 137
Total - All carriers	$139 203 819	$5 862 837	$24 853 445

[a] Gulf,Mobile & Northern includes New Orleans Great Northern in 1933 and 6 months 1934.

96806-O U.S. GOVERNMENT PRINTING OFFICE : 1934

Year of birth	Attained age 1932	YEAR OF ENTRY: 1875 & prior	1876	1877	1878	1879	1880	1881	1882	1883	1884	1885	1886	1887	1888	1889	1890	1891	1892	1893
		YEARS OF SERVICE: 57 & over	56	55	54	53	52	51	50	49	48	47	46	45	44	43	42	41	40	39
1850 & prior	82 & over	27	1	1	3	4	5	3	4	2	5	3	4	1	6	6	3	6	5	3
1851	81	6		3	1	2	1	2	1	6	1	2	2	1	3	1	2	2	2	2
1852	80	22		2	2	3	5	3	7	3	6		1	5	3	3	2	2	5	2
1853	79	23	1	4	1	3	5	6	7	7	6	5	5	2	5	5	3	5	1	2
1854	78	18	3	6	3	6	10	11	5	7	9	9	9	7	7	3	5	4	6	8
1855	77	27	11	6	7	6	13	16	15	8	7	8	8	8	6	6	11	9	9	6
1856	76	21	9	4	7	8	12	16	17	15	8	15	11	14	15	12	13	11	7	10
1857	75	37	10	12	8	7	21	26	23	17	20	13	20	20	10	19	15	14	15	12
1858	74	34	4	17	16	24	23	23	33	17	13	20	23	27	21	26	34	16	20	16
1859	73	22	13	13	13	27	40	42	40	27	24	24	31	39	27	30	33	27	31	24
1860	72	24	13	13	25	27	40	53	65	56	43	48	49	58	49	46	48	30	47	38
1861	71	8	10	21	20	36	42	60	79	67	46	51	60	60	53	58	66	51	56	38
1862	70	16	5	16	19	43	66	100	111	106	92	65	116	122	102	95	101	83	87	53
1863	69	6	11	11	28	52	81	106	156	149	122	84	160	175	152	149	169	112	139	109
1864	68	2	4	9	11	31	60	108	134	134	138	138	181	238	182	177	220	144	141	131
1865	67	2		5	6	23	49	89	117	148	153	163	232	252	207	233	260	212	205	153
1866	66		1	2	4	14	32	62	112	146	149	163	236	320	296	297	348	265	249	207
1867	65	1			5	9	25	54	109	155	136	168	266	366	372	393	426	387	310	257
1868	64			1	1	3	14	20	65	100	141	141	245	344	395	432	501	404	428	283
1869	63				1	1	5	16	33	46	92	161	229	329	324	452	541	486	499	377
1870	62						5	5	13	36	51	96	172	285	355	377	540	506	491	372
1871	61						2	1	8	12	22	49	128	177	273	336	407	473	537	404
1872	60							2	4	6	8	31	62	154	213	367	461	467	561	468
1873	59								3	1	2	11	25	81	121	235	385	400	502	458
1874	58								1	1	1	1	9	29	81	156	272	344	439	366
1875	57										2	3	4	20	29	103	176	243	420	334
1876	56												1	8	11	49	95	157	309	288
1877	55										2		2	3	1	18	44	92	183	225
1878	54											2			5	9	22	52	76	137
1879	53												1	1	3	7	7	16	23	84
1880	52														1	1	3	6	20	25
1881	51															1	2		4	13
1882	50															1			1	2
1883	49																			1
1884	48																			1
1885	47																			
1886	46																			1
1887	45																			
1888	44																			
1889	43																			
1890	42																			
1891	41																			
1892	40																			
1893	39																			
1894	38																			
1895	37																			
1896	36																			
1897	35																			
1898	34																			
1899	33																			
1900	32																			
1901	31																			
1902	30																			
1903	29																			
1904	28																			
1905	27																			
1906	26																			
1907	25																			
1908	24																			
1909	23																			
1910	22																			
1911	21																			
1912	20																			
1913	19																			
1914	18																			
1915 & later	17 & under																			
Total		296	94	141	181	329	556	824	1 167	1 272	1 299	1 494	2 292	3 144	3 328	4 082	5 215	5 026	5 828	4 910

NUMBER OF EMPLOYEES, EXCLUDING OFFICERS, GROUPED ACCORDING TO ATTAINED AGE AND YEARS OF SERVICE

ENTRY																							
0	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910	1911	191
SERVICE																							
	41	40	39	38	37	36	35	34	33	32	31	30	29	28	27	26	25	24	23	22	21	20
3	6	5	3	2	2	6	5	4	5	9	9	2	5	5	6	13	7	4	4	6	5	
2	2	2	2		2	2	1	1	6	2	2			4	3	3	3	1	4	5	2	
2	3	3	2	2	2	1	2	2	3	6	8	8	3	1	3	4	3	4	3	6	3	
3	5	1	2		3	1	2	3	2	5	6	7	4	3	3	3	6	7	4	2	3	
5	6	6	8	5	4	4	5	1	5	6	4	4	4	8	5	5	4	7	3	10	5	
11	9	9	6	8	9	3	4	6	8	8	8	4	7	11	3	8	16	7	6	8	7	
13	11	7	16	10	7	7	7	8	5	8	13	10	13	14	11	17	15	11	15	13	11	
15	14	15	12	10	9	6	8	15	10	15	16	12	17	9	13	24	23	7	14	15	10	
24	16	20	16	15	20	8	11	11	17	20	20	16	16	13	17	25	25	17	18	23	13	
33	27	31	24	21	25	17	17	12	24	27	19	26	31	22	15	25	27	21	28	24	15	
48	30	47	38	26	36	31	27	26	24	36	39	28	37	28	30	36	36	23	37	31	26	
56	51	56	38	46	32	30	32	39	47	35	41	56	41	41	41	53	46	46	34	30	41	
91	83	87	53	77	58	53	47	60	55	66	89	70	73	62	64	87	92	68	62	56	71	10
139	112	139	109	89	85	88	68	83	86	81	99	86	94	90	94	94	114	80	93	103	93	10
180	144	141	131	119	101	94	83	110	120	112	120	130	140	108	108	125	155	98	101	112	101	10
260	212	205	153	131	130	106	100	141	131	133	136	154	146	108	148	139	169	121	130	162	117	11
338	265	249	207	177	165	114	137	155	156	169	169	195	180	153	179	187	210	144	175	181	172	14
426	387	310	257	191	188	156	142	194	210	270	232	254	205	148	197	213	240	144	183	219	191	15
501	404	428	283	236	247	193	184	209	243	240	287	307	269	189	211	238	224	178	194	218	195	17
621	486	499	377	265	280	229	229	246	288	317	365	347	334	243	273	312	280	208	251	264	248	21
780	506	491	372	245	302	224	251	324	339	336	358	375	402	310	366	319	340	240	300	322	239	21
907	473	537	404	284	357	256	257	303	334	368	367	388	344	300	323	355	331	196	264	323	274	27
1 021	467	561	468	358	403	353	349	428	435	490	462	488	457	415	446	513	459	312	333	404	318	41
1 185	400	502	458	349	456	341	401	473	441	482	499	536	519	389	419	581	466	277	379	409	343	31
1 272	344	439	366	300	488	414	429	529	665	603	556	671	590	475	516	527	490	329	398	397	345	45
1 376	243	420	334	290	433	401	499	528	709	717	676	751	665	491	587	617	597	346	463	493	418	46
1 395	157	309	288	284	390	401	544	685	852	848	811	859	789	583	710	742	637	393	504	590	474	50
1 344	92	183	225	219	325	308	402	647	867	808	870	922	820	599	720	764	695	362	476	535	418	54
1 307	52	76	137	158	279	275	377	598	942	993	1 026	1 192	1 033	721	834	884	894	509	531	642	510	60
1 267	16	23	84	89	193	239	324	476	717	1 075	1 139	1 241	1 181	832	1 009	981	928	492	652	725	583	70
1 211	6	20	25	51	107	170	219	424	585	816	1 199	1 482	1 228	942	1 219	1 228	1 116	664	815	882	660	75
1 142	2	4	13	18	58	85	142	326	467	661	870	1 460	1 416	939	1 261	1 322	1 125	587	755	857	616	76
1 094		1	2	7	22	44	94	241	369	605	719	1 112	1 586	1 327	1 549	1 659	1 404	740	1 003	1 100	781	99
1 035			1	1	12	17	47	138	222	489	659	934	1 090	1 317	1 772	1 750	1 573	814	1 096	1 096	808	99
1 000			1	1	5	4	33	67	144	342	583	885	1 010	1 026	2 057	2 180	1 806	1 012	1 376	1 439	1 021	1 18
1 000					1		8	21	52	202	349	714	861	796	1 273	2 180	2 098	1 081	1 495	1 499	1 048	1 32
1 000			1	1	1		4	11	27	100	199	451	602	737	1 153	1 567	2 119	1 253	1 671	1 723	1 263	1 52
1 000				1	2	3	3	7	17	66	94	292	513	578	960	1 280	1 449	1 180	1 828	1 799	1 220	1 53
1 000							1	3	7	16	39	131	285	481	871	1 319	1 373	971	2 153	2 655	1 527	1 92
1 000								1	4	5	14	69	135	274	624	1 023	1 266	869	1 375	2 483	1 839	2 07
1 000										2	6	15	50	118	313	673	982	757	1 187	1 473	1 764	2 63
1 000								1			2	5	13	37	124	389	647	603	1 079	1 375	1 158	2 58
1 000									1	2		5	8	22	52	191	391	461	890	1 355	1 144	1 74
1 000												1		3	10	47	155	223	615	963	1 093	1 47
1 000											1	1	2	1	7	18	49	88	310	709	818	1 49
1 000														1		9	19	35	97	316	605	1 00
1 000														1	1	6	12	9	54	126	278	76
1 000															1	1	2	10	15	47	120	17
1 000															1	1	2	2	7	16	37	12
1 000																1		3	11	6	16	4
1 000																		1		7	3	1
1 000																			1	1	2	
1 000																			1	1	3	
1 000																				

YEAR OF ENTRY																				Total no. for each year of birth	Year of birth	Attained age 1932
1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	1931			
YEARS OF SERVICE																						
20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1			
9	11	8	3	11	10	14	6	9	2	7	10	1	3	1		1				297	1890 & prior	82 & over
2	4			2	7	9	2		1	4	2		2							116	1891	81
4	2	1	3	4	4	5	6	3	2	6	7	1	2	1			1			156	1892	80
7	5	6	7	10	8	10	7	6	5	6	7	2	1	1	1			1		252	1893	79
8	9	6	4	6	7	20	10	8	5	12	2	3	3	1	2	1			1	312	1894	78
4	7	8	9	12	13	25	10	11	6	16	5	2	10	3	3	1	1			464	1895	77
11	14	12	5	23	21	23	15	18	10	26	16	12	5	8	3	2	1	3	1	647	1896	76
15	21	32	8	28	29	25	15	17	9	33	19	10	6	6	5	5	4	2		841	1897	75
15	21	16	16	18	22	24	19	24	16	43	18	9	7	8	7	3	2	2	1	1 063	1898	74
34	29	13	17	35	44	54	34	27	18	64	30	23	13	11	9	3	4	5		1 420	1899	73
47	39	38	25	54	52	98	50	55	25	71	45	29	18	23	13	7	4	3	1	2 054	1900	72
39	48	23	40	52	73	96	49	48	31	110	58	32	23	23	17	9	8	7	3	2 424	1901	71
100	53	55	41	82	132	170	76	94	49	135	96	40	34	35	14	18	12	7	4	3 855	1902	70
104	93	70	73	93	138	208	109	128	52	205	135	70	56	47	26	20	16	5	3	5 324	1903	69
100	77	74	83	111	189	275	138	152	77	258	156	82	59	42	52	41	22	19	13	6 239	1904	68
131	130	85	103	141	256	290	157	197	87	275	195	112	83	71	43	37	22	30	12	7 430	1905	67
186	154	95	100	183	212	324	182	181	96	317	186	102	102	77	60	33	48	13	11	8 586	1906	66
190	172	117	109	177	369	373	138	233	107	378	233	122	104	91	66	38	32	22	13	10 170	1907	65
249	231	125	125	224	316	465	230	256	120	386	270	148	121	97	91	59	52	25	12	11 183	1908	64
285	244	174	150	243	372	491	275	303	126	464	250	146	140	104	93	75	60	52	8	12 600	1909	63
288	310	223	193	264	412	586	328	342	163	567	347	183	178	138	116	114	92	50	22	13 830	1910	62
277	292	188	226	323	408	524	283	334	213	536	360	190	181	163	108	99	88	55	17	13 342	1911	61
436	396	237	310	416	622	724	372	450	236	824	476	266	192	197	179	118	115	73	32	16 872	1912	60
371	340	214	243	433	620	750	385	421	250	800	529	267	189	180	162	150	131	62	23	16 500	1913	59
452	414	262	280	473	682	827	496	544	261	910	612	293	274	217	156	149	140	105	40	18 059	1914	58
460	412	258	292	441	720	955	583	670	276	1 025	637	340	343	218	212	167	148	82	45	19 299	1915	57
502	489	327	347	596	861	1 012	658	878	382	1 182	693	346	328	318	214	[illegible]	172	108	50	21 669	1916	56
541	452	320	349	576	838	896	618	807	402	1 353	767	353	311	304	223	[illegible]	137	118	44	20 896	1917	55
605	643	357	367	591	854	1 100	648	866	484	1 765	1 083	492	397	356	283	270	186	119	53	24 222	1918	54
706	618	403	442	613	972	1 213	731	962	536	1 893	1 298	616	422	355	332	249	206	121	60	25 772	1919	53
757	687	481	486	721	1 079	1 300	762	1 117	542	2 084	1 704	830	630	493	400	294	249	170	87	28 536	1920	52
768	688	445	465	740	1 061	1 270	804	1 035	572	1 826	1 369	767	729	611	371	289	267	146	77	27 285	1921	51
991	801	510	588	921	1 366	1 512	908	1 233	635	2 350	1 571	859	913	968	615	350	312	225	112	32 106	1922	50
997	873	527	543	916	1 335	1 609	900	1 207	609	2 211	1 659	800	918	953	805	580	323	190	108	31 905	1923	49
1 185	1 033	644	696	990	1 563	1 794	1 140	1 379	768	2 690	1 803	1 026	974	1 024	974	829	545	281	136	36 466	1924	48
1 323	1 089	613	735	1 054	1 598	1 841	1 110	1 563	694	2 549	1 783	1 059	1 102	944	904	933	706	343	132	35 729	1925	47
1 530	1 188	732	748	1 188	1 824	1 767	1 044	1 673	744	2 646	1 937	1 069	1 155	1 161	905	947	686	453	186	36 246	1926	46
1 535	1 253	762	803	1 164	1 615	1 595	1 096	1 583	832	2 706	1 857	1 012	1 095	1 061	1 045	820	624	469	229	34 508	1927	45
1 522	1 352	853	945	1 487	1 952	1 858	1 274	1 913	929	3 233	2 361	1 217	1 283	1 442	1 292	1 305	745	548	284	40 225	1928	44
2 071	1 686	920	997	1 528	2 106	1 853	1 338	1 864	841	2 993	2 258	1 310	1 269	1 227	1 144	1 171	805	479	285	38 123	1929	43
2 631	2 012	983	1 025	1 788	2 104	1 820	1 283	1 905	875	2 904	2 189	1 254	1 359	1 281	1 097	1 371	821	542	313	36 797	1930	42
2 5[illegible]	[illegible]4	1 040	1 135	1 840	2 223	1 722	1 340	1 845	829	2 850	2 048	1 061	1 256	1 318	1 028	1 020	725	488	325	34 413	1931	41
1 746	[illegible]5	1 357	1 407	2 362	2 781	2 077	1 593	2 430	1 089	3 596	2 529	1 402	1 463	1 647	1 472	1 368	913	647	366	39 093	1932	40
1 474	[illegible]8	1 139	1 496	2 322	2 740	1 888	1 518	2 345	926	3 183	2 433	1 248	1 306	1 423	1 442	1 382	854	533	361	34 621	1933	39
1 497	1 528	932	1 691	3 024	2 886	1 885	1 645	2 548	1 047	3 488	2 548	1 455	1 413	1 506	1 372	1 481	993	656	370	35 271	1934	38
1 003	1 361	910	1 143	2 809	3 338	1 821	1 758	2 691	1 065	3 369	2 551	1 429	1 461	1 535	1 484	1 453	1 076	745	348	34 432	1935	37
749	1 034	814	1 036	1 870	3 490	2 087	1 684	2 716	1 034	3 527	2 749	1 543	1 657	1 684	1 407	1 462	952	729	438	33 149	1936	36
373	686	689	994	1 785	2 715	2 432	1 836	2 832	1 020	3 760	2 823	1 546	1 665	1 676	1 551	1 421	1 014	645	410	32 071	1937	35
164	336	501	794	1 921	2 844	2 686	2 067	3 702	1 187	4 065	3 247	1 700	1 853	2 050	1 732	1 943	1 048	711	451	35 062	1938	34
49	128	199	532	1 177	2 672	2 609	1 553	3 524	1 133	3 761	3 019	1 664	1 794	1 947	1 691	1 631	1 108	588	354	31 170	1939	33
10	33	97	281	1 032	2 257	2 907	1 760	2 432	1 148	4 587	3 815	2 099	2 437	2 531	2 209	2 474	1 383	911	555	34 969	1900	32
7	16	25	87	386	1 696	2 300	1 507	2 046	888	4 122	3 875	1 887	2 156	2 329	1 892	2 108	1 134	775	422	29 662	1901	31
6	6	16	25	171	780	1 860	1 287	2 223	890	3 002	3 843	2 514	2 577	2 764	2 181	2 294	1 364	856	549	29 813	1902	30
	6	3	15	41	252	764	829	1 648	739	2 534	2 896	2 355	2 884	2 746	2 488	2 379	1 535	936	537	25 587	1903	29
	3	1	4	17	70	276	314	1 101	577	2 529	2 953	1 845	3 020	3 694	2 738	2 683	1 716	1 113	598	25 352	1904	28
			2	9	21	62	108	423	355	1 604	3 166	1 984	2 286	3 830	3 292	2 874	1 837	1 085	608	23 546	1905	27
			2	3	12	21	31	148	140	933	2 008	2 058	2 662	2 779	3 184	3 425	2 139	1 222	633	21 400	1906	26
				1	2	7	6	32	48	299	1 342	1 340	2 613	3 325	2 588	3 234	1 713	1 390	707	19 647	1907	25
			1		5	2	3	11	15	87	370	895	1 652	3 383	2 814	2 383	2 883	1 658	764	16 926	1908	24
						2	1	3	4	26	102	213	933	1 977	2 692	2 618	2 217	1 550	834	13 172	1909	23
					1			5	2	8	17	53	235	1 044	1 [illegible]86	2 483	2 594	1 242	872	10 044	1910	22
						1				5	13	10	50	215	746	1 312	2 486	1 226	624	6 688	1911	21
											2	4	6	61	143	[illegible]23	1 323	1 005	531	3 698	1912	20
														8	53	117	544	455	422	1 599	1913	19
														1	4	25	82	179	192	483	1914	18
																					1915 & later	17 & Under
31 550	29 779	18 951	22 646	39 502	57 503	57 270	39 179	59 221	26 204	93 258	77 222	45 800	52 409	59 737	53 730	55 127	42 440	26 320	14 770	1 215 897	Total	

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A survey of this record [illegible]

the Committee of Counsel for the plaintiffs in this cause and furnished to the affiant for the said purpose and is as shown in the attached Exhibit A.

The second of said questionnaires called for a report of each said company as to the number of employees who left carrier service within the year July 1, 1933, to July 1, 1934, and have not returned to such service, other than those removed by death, and called for an answer to each of two questions: (1) The number who left carrier service? (2) In your best judgment how many of those included in the answer to question (1) will not return to your service?

As shown by the copy thereof hereto attached, the letter transmitting these two questionnaires called for the returns to reach the affiant not later than September 12, 1934. Since the said letter and questionnaires were transmitted returns have been coming in to the affiant from the railroads so addressed, and as the returns have come in they have been tabulated by the affiant on corresponding questionnaire forms and totals of the tabulations have been brought forward as additional returns came in.

Compiling, tabulating, and totaling the results of all of the said returns to questionnaire No. 1, affiant shows the totals for all of the said 124 plaintiffs from whom reports have been received to date as follows:

Report of 124 plaintiffs, showing number of employees receiving pay during month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof

Class of duties in which exclusively engaged	Number
1. Executive and General Officers	6,525
2. Finances, custody, and administration of securities or funds	3,680
3. Corporate proceedings or records	297
4. Real Estate, taxes, and titles	1,166
5. Experimentation and Research	771
6. Claims and litigation	5,535
7. Accounting	36,243
8. Advertisement, industrial development, and traffic solicitation	19,392
9. Management, operation, care, or protection of buildings or lands not devoted to or used in connection with transportation	2,918
10. Work relating to the construction of buildings and lines of railway	9,395
11. Work relating to the construction of new equipment	2,984
12. Work relating to reconstruction or major repair of equipment withdrawn from transportation service	87,173
13. Foremen and laborers in stores, reclamation and timber-treating plants	17,147
14. Storekeepers, sales agents, and buyers	7,636
15. Pumping equipment operators, stationary engineers and firemen, oilers, coal passers, and water tenders	6,846
16. All other employees not engaged in interstate commerce not included in the preceding classes, with such explanation as may be needed	9,961
Total number not engaged in interstate commerce	217,669

NOTE.—There is included in each class not engaged in interstate commerce the office and clerical assistance employed in connection with the work indicated.

Affiant is advised that associations and other organizations owned and controlled by carriers by railroad subject to the Interstate Commerce Act are probably carriers within the meaning of the Railroad Retirement Act and that their employees are probably employees within the said Act. Affiant has endeavored to compile as complete a list as possible of such associations, engaged in general work for

the benefit of railroads but in nowise engaged in transportation or operation of any carrier properties. The following list of such organizations may not be all-inclusive but affiant is familiar with those contained in the following list.

Affiant within the past few days has communicated by telegraph or telephone with the offices of each of the following such organizations asking for an immediate report as to the total number of its employees and the responses of the said organizations showing the total number of employees for each are here set forth:

	Number of employees
American Association of Railroad Superintendents, St. Louis, Mo.	1
American Railway Association, Washington, D. C.	204
American Railway Bridge & Building Association, Chicago, Ill.	1
American Short Line Railroad Association, Washington, D. C.	13
Association of Railway Executives, Washington, D. C.	22
Association of Western Railways, Chicago, Illinois	9
Bureau of Explosives, New York City	37
Bureau of Information of the Eastern Railways, New York City	17
Bureau of Information-Southeastern Railways, Washington, D. C.	6
Bureau of Railway Economics, Washington, D. C.	39
Central Freight Association, Chicago, Ill.	373
Central Passenger Association, Chicago, Ill.	18
Committee on Public Relations, Eastern Presidents Conference, New York City	13
Eastern Car Foreman's Association, New York City	11
Eastern Railroad Association, Washington, D. C.	10
General Manager's Association of Chicago, Chicago, Ill.	220
Illinois Freight Association, Chicago, Ill.	26
New England Freight Association, Boston, Mass. New England Passenger Association, Boston, Mass.	28
Official Classification Committee, New York City	17
Railway Accounting Officers Association, Washington, D. C.	5
Railway Ticket Protective Bureau, Chicago, Ill.	3
Southeastern Passenger Association, Atlanta, Georgia	23
Southern Freight Association, Atlanta, Georgia	84
Southern Freight Tariff Bureau, Atlanta, Georgia	178
Southern Ports Foreign Freight Committee, Chicago, Ill.	4
Southwestern Freight Bureau, St. Louis, Mo.	201
Southwestern Passenger Association, St. Louis, Mo.	20
Texas, Louisiana Tariff Bureau, Dallas, Texas	18
Traffic Executive Association, New York City	2
Trans-Continental Freight Bureau, Chicago, Ill.	218
Trans-Continental Passenger Association, Chicago, Ill.	36
Trunk Line Association, New York City	472
Western Association of Railway Executives, Chicago, Ill.	123
Western Classification Committee, Chicago, Ill.	10
Western Railway's Committee on Public Relations, Chicago, Ill.	8
Western Trunk Line Committee, Chicago, Ill.	92
Total number	2,562

On the basis of the foregoing table and the responses contained therein, affiant states that the total of said 2,562 employees of said organizations are persons having no work or duties in connection with transportation or with operation of any carrier properties or with the business of any carrier by railroad. There have not been included in the foregoing list any of the Weighing and Inspection Bureaus, Demurrage Bureaus, or other such bureaus whose employees actually do perform work in connection with transportation of persons or property by railroad.

Responsive to questionnaire No. 2, distributed by the affiant with his letter of August 31, 1934, see Exhibit A hereto, the affiant at the time of the execution of this affidavit has received responses from 123 of the plaintiffs in this cause, each response being covered by an affidavit of the reporting officer in the form shown thereto attached in Exhibit A hereto.

Affiant has tabulated and totaled the responses to said questionnaire and on the basis thereof states that, as to those plaintiffs who have already reported, 143,034 employees left carrier service within the year July 1, 1933, to July 1, 1934, and have not returned to such service, other than those removed by death, and that of that total of 143,034, in the expressed best judgment of the reporting officers of said plaintiff carriers, a total of 83,812 will not return to the service of said carriers, but have permanently left the said service.

Affiant further states that when the returns for all of the plaintiffs to questionnaires Nos. 1 and 2, sent out by his letter of August 31, 1934, are complete he will supplement this affidavit so as to show the final figures based on complete returns.

(Signed) JULIUS H. PARMELEE,
(Name)
Director, Bureau of Railway Economics,
(Title)
Transportation Bldg., Washington, D. C.
(Address)

Subscribed and sworn to before me this 17th day of September 1934.

[L. S.] MARY T. KINNEY.
(Notary public)

My Commission expires Oct. 3, 1938.

EXHIBIT A

BUREAU OF RAILWAY ECONOMICS,
TRANSPORTATION BUILDING,
SEVENTEENTH AND H STREETS NW.,
Washington, D. C., August 31, 1934.

DEAR SIR: The committee of counsel in charge of pension litigation for the carriers have requested me to obtain certain information for use in preparation of affidavits as quickly as possible.

I

I attach a questionnaire, as to classes of employees "not engaged in interstate commerce", which you will please have filled out as soon as possible and return to me. There is attached hereto an extract from Article III, Section 1, of the bill of complaint in the case. From this you will see what the allegation is. Near the close of the section, it is stated that the aggregate of employees not engaged in interstate commerce is not less than 200,000, or approximately one-fifth of all the employees of plaintiffs. The data I ask you for is to supply the basic facts with reference to that allegation.

The occupations or classes of officers and employees listed on the questionnaire are taken from the bill. You will see that they do not correspond exactly with the reporting divisions or classification

numbers furnished monthly to the I. C. C., but you will doubtless from your monthly report secure assistance in answering the questionnaire. There is attached to the questionnaire a brief statement ("Memoranda of formulae to be followed, etc.") as to employees included in each of the numbered classes of the questionnaire who are to be counted as not engaged in interstate commerce. I am advised that there may be a difference of opinion on these several points, but that the classification is made in view of court decisions and in an effort to secure accurate information as to the employees not engaged in interstate commerce. For the sake of uniformity, please follow as closely as possible the segregations suggested.

I am directed to prepare a general affidavit which will be a summary of the individual affidavits secured from each plaintiff carrier. There is also attached to the questionnaire, at the beginning thereof, a form of affidavit which you will please use in sending in your return.

You will note in Article III of the bill of complaint the following:

"It is not practicable to recite the occupations or duties of all of plaintiffs' employees whose work is outside of interstate commerce."

If you have any class of employees which is not specifically incorporated in the questionnaire, then, in the last blank space, numbered 16, insert the class of employee and the number not engaged in interstate commerce. Be very careful not to list any borderline cases.

II

Section 3 of Article III of the bill of complaint reads:

"Within one year before the approval of the Act more than 50,000 of plaintiffs' employees left carrier service and have not returned to it. At the time the Act was approved such persons were not, and since then have not been, employees of any carrier or connected in any way with any business conducted by the carriers. Under the Act, as plaintiffs are advised and charge the Act is construed and is about to be enforced by defendants, plaintiffs are required to contribute to annuities for such persons."

There is attached a questionnaire, as to number of employees who left carrier service within the past year, designed to develop the facts for your company on the point raised in above paragraph. Counsel are endeavoring to show (Question 1) how many employees left carrier service from June 27, 1933, to June 27, 1934 (or, for convenience, July 1, 1933, to July 1, 1934), and have not returned to it. We realize that you will not know whether men who have quit your service have gone to work on some other railroad. You will answer only as to those who have left your service and are not now employed therein. The committee are proceeding upon the assumption, and will introduce proof, that with rare exception no carrier, due to its reserve list, has within that period employed a man from an outside road; in other words, that the railroads within the year have only reemployed men who were furloughed or on their seniority list.

In answer to Question 2, we are endeavoring to secure information as to how many men, in your judgment, have left and will *not* return, excluding, of course, those who have died in the period, because they will not secure pensions. The answer to Question 2 will

naturally include resignations, dismissals, and those who, in the judgment of the immediate employing officer, will not return for any good individual reason.

From conferences with several lines we feel that the answer to this questionnaire may involve the exercise of reasonable judgment on the part of the men who know. We wish the information as accurate as possible.

The committee requests that you disregard any previous report you may have made for your company on these subjects, and the methods of compiling such report, insofar as they may conflict herewith.

Please have these two questionnaires filled out and one copy of each executed and returned, so as to reach me not later than September 12, 1934.

Very truly yours,

JULIUS H. PARMELEE,
Director.

Extract from article III, pages 12–13, bill of complaint no. 57557, in equity, Alton R. R. Co. et al. *vs.* Railroad Retirement Board

The facts with reference to employees who are not engaged in interstate commerce and persons who are not employees of the plaintiffs or any other carriers, but in each case are nevertheless beneficiaries under the act, are as follows:

1. Many of the persons in plaintiffs' employ do no work in the interstate commerce conducted by plaintiffs, and no work so closely connected therewith as to be a part thereof or to be within the regulatory power of Congress under the commerce clause. The services of such persons are confined wholly to executive duties or to work relating to finances, custody, or administration of securities or funds, corporate proceedings or corporate records, taxes, titles, experimentation, research, claims, litigation, accounting, advertising, industrial development, and traffic solicitation; or work relating to the management, operation, care, or protection of buildings and lands not devoted to or used in connection with transportation; or work relating to the construction of buildings and lines of railway, the construction of new equipment, or the reconstruction or major repair of other equipment, withdrawn from transportation service; and office and clerical assistance in connection with the work above described. It is not practicable to recite the occupations or duties of all of plaintiffs' employees whose work is outside interstate commerce, but some of the plaintiffs have employees exclusively engaged in all, and all of them have employees exclusively engaged in some, of the classes of work hereinabove set forth. The exact number of those so engaged in the employ of the several plaintiffs varies, but in the aggregate the number is not less than 200,000, or approximately one-fifth of all the employees of plaintiffs. The amount of wages paid by plaintiffs to such employees is not less than $300,000,000 annually. In addition, large numbers of plaintiffs' employees are engaged exclusively in intrastate commerce.

AFFIDAVIT

STATE OF _____
County of _____, *ss:*

The undersigned _____, of the
(Title of officer)
_____ being first duly sworn, deposes and says
(Full name of plaintiff company)
that he has prepared the annexed report and that the answers to the questions, and each of them therein contained, have been prepared by him or under his direction; that he has carefully examined the same and the sources of information from which the statistics therein contained have been compiled; that the said annexed report and the statistics contained therein concerning the said company's employees are correct, as indicated. And the undersigned further deposes and says that he has been duly authorized by his employer company to prepare the said report and to make this affidavit, and that he makes this affidavit with the knowledge and intent that it shall be used in evidence in the trial of the above-entitled cause, or any hearing that may be held therein.

_____
(Name)
_____
(Railroad)
_____
(P. O. Address)

Subscribed and sworn to before me this _____ day of _____, 1934.

_____
(Notary public)

My Commission expires_____.

REPORT OF

_____
(Name of plaintiff company in full)

Showing number of employees receiving pay during month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof.

Class of duties in which exclusively engaged:	Number
1. Executive and General Officers	
2. Finances, custody, and administration of securities or funds	
3. Corporate proceedings or records	
4. Real Estate, taxes, and titles	
5. Experimentation and Research	
6. Claims and litigation	
7. Accounting	
8. Advertisement, industrial development, and traffic solicitation	
9. Management, operation, care, or protection of buildings or lands not devoted to or used in connection with transportation	
10. Work relating to the construction of buildings and lines of railway	
11. Work relating to the construction of new equipment	
12. Work relating to reconstruction or major repair of equipment withdrawn from transportation service	
13. Foremen and laborers in stores, reclamation, and timber-treating plants	
14. Storekeepers, sales agents, and buyers	

Class of duties in which exclusively engaged—Continued.	Number
15. Pumping-equipment operators, stationary engineers, and firemen, oilers, coal passers, and water tenders	
16. All other employees not engaged in interstate commerce not included in the preceding classes, with such explanation as may be needed	
Total number not engaged in interstate commerce	

NOTE.—There is included in each class not engaged in interstate commerce the office and clerical assistance employed in connection with the work indicated.

(Signature of affiant)

(Title)

Memoranda of Formulae to be Followed in Preparation of Answers to Questionnaire for Use in Pension Litigation as to Classes of Employees "Not Engaged in Interstate Commerce"

1. *Executive and general officers.*—Classify as not engaged in interstate commerce those executives listed under I. C. C. group symbol (X. E. X.), pages 116 et sequitur, U. S. Railroad Labor Board Rules for Reporting Information on Railroad Employees, excluding Vice President in charge of operation and his staff; also classify as not engaged in interstate commerce Superintendent of Electrical Construction, Consulting Engineer, Architect or Consulting Architect, Valuation Engineer, Engineer of Service, and Engineer of Construction, and other office engineers.

2. *Those engaged in work relating to finance, custody, or administration of securities or funds.*—Classify as not engaged in interstate commerce Treasurer, Paymaster, and any person whose sole duty concerns finance, custody, or administration of securities, receiving or paying out money, such as cashiers in larger agencies, who have no connection with the operation of trains; Registrar of Stocks; Registrar of Bonds; and all assistants of the foregoing who assist and act for said officers.

3. *Corporate proceedings and corporate records.*—Classify as not engaged in interstate commerce all Secretaries, Assistant Secretaries, and their staffs, and any others whose duties are confined to this class.

4. *Real estate, taxes, and titles.*—Classify as not engaged in interstate commerce persons who come within this class, such as Commissioners of Real Estate, General Real Estate Agents, Tax Commissioners, Tax Agents, Right-of-Way Agents, Land Commissioners, Superintendent of Real Estate and Conveyancing, and their assistants; also all under real estate, tax agent, and investigator groups, pages 160 to 162 of the Railroad Labor Board Rules.

5. *Experimentation and research.*—Classify as not engaged in interstate commerce Engineer of Tests, Superintendent of Tests, Chief Chemist, and their assistants, and any others whose duties fall within this class.

6. *Claims and litigation.*—Classify as not engaged in interstate commerce all of the Law Department, including those listed on page 119 of the Railroad Labor Board Rules; also Claim Agents and Claim Investigator groups listed on pages 157 to 159 of the Rules.

7. *Accounting.*—Classify as not engaged in interstate commerce all that come within accounting under the head "Other Departments" on pages 118 and 119 of the Railroad Labor Board Rules, and all of their assistants; also all coming under the Traveling Auditor and Accountant groups, pages 96 and 97 of the Rules.

8. *Advertising, industrial development, and traffic solicitation.*—Classify as not engaged in interstate commerce Division No. 25, pages 26 and 27 of the Railroad Labor Board Rules; also everybody under Traffic Service symbol "F", pages 250 to 254 of the Rules, excluding persons classed as Tourist Guides or Handling of Special Parties or such Special Agents who directly supervise or travel with any character of freight traffic.

9. *Work relating to the management, operation, care, or protection of buildings and lands not devoted to or used in connection with transportation.*—Those buildings not devoted to or used in transportation are: general office buildings, buildings owned by the carrier but which are rented or leased to others; and any buildings owned by others and leased by the carrier, when not used for the purposes directly connected with the operation of trains. All lands should be considered as not devoted to transportation, except such as may be used for right-of-way, for buildings or roundhouses, or other purposes directly concerned with the operation of trains. In this class there should be classified as not engaged in interstate commerce all persons who are engaged in the management, operation, care, or protection of buildings and lands not devoted to or used in connection with transportation, such as building superintendents, electricians, switchboard operators, messengers, janitors, watchmen, elevator operators, etc.

10. *Work relating to the construction of buildings and lines of railway.*—Classify as not engaged in interstate commerce all those engaged on new construction.

11. *Construction of new equipment.*—This is self-explanatory.

12. *Reconstruction or major repair of equipment withdrawn from transportation service.*—Classify as not engaged in interstate commerce men engaged in back-shop work or in foundry work. Be certain that the men so classified are not engaged in running repairs or in any service other than classified repairs to equipment withdrawn from transportation service.

13, 14, and 15. Self-explanatory.

16. All other employees not engaged in interstate commerce. (With explanatory footnote.)

General Note.—Office and clerical assistants in connection with any of the classes above described.—In each class classify as not engaged in interstate commerce the office or clerical assistants employed in connection with such work; for instance, all supervisory and chief clerks, general office clerks, all clerks in the Law Department, all clerks and operators or mechanical devices in the Land Department, Traffic Department, etc. Do not classify as not engaged in interstate commerce the clerical and stenographic forces of those officers who are not themselves classified as not engaged in interstate commerce, and do not so classify any clerks whose duties are directly connected with the operation of trains, such as yard clerks, roundhouse clerks, train- and engine-crew callers, or the like.

AFFIDAVIT

STATE OF _____,
County of _____, *ss:*

The undersigned _____ of the _____
(Title of officer) (Full name of plaintiff company)
_____, being first duly sworn, deposes and says that he has prepared the annexed report and that the answers to the questions, and each of them therein contained, have been prepared by him or under his direction; that he has carefully examined the same and the sources of information from which the statistics therein contained have been compiled; that the said annexed report and the statistics contained therein concerning the said company's employees are correct, as indicated. And the undersigned further deposes and says that he has been duly authorized by his employer company to prepare the said report and to make this affidavit, and that he makes this affidavit with the knowledge and intent that it shall be used in evidence in the trial of the above-entitled cause, or any hearing that may be held therein.

_____
(Name)
_____
(Railroad)
_____
(P. O. Address)

Subscribed and sworn to before me this _____ day of _____, 1934.

_____
(Notary public)

My Commission expires _____.

REPORT OF

_____
(Name of plaintiff company in full)

as to number of employees who left carrier service within the year July 1, 1933, to July 1, 1934, and have not returned to such service, other than those removed by death.

1. Number left carrier service? _____
2. In your best judgment how many of those included in the answer to question 1 will not return to your service? _____

_____
(Signature of affiant)
_____
(Title)

Plaintiffs' Exhibit 3

AFFIDAVIT

Filed Oct. 11, 1934

JULIUS H. PARMELEE, being first duly sworn, deposes and says:

Affiant is the same Julius H. Parmelee who has heretofore made two affidavits in the above-entitled cause, and he has the experience

and qualifications and holds the position stated in said prior affidavits. He makes this affidavit with knowledge that it is to be used as evidence in the above-entitled cause.

I

Number of Employees in the Employ of Plaintiffs of Age 70 or More Who Will Be Required by Section 4 of the Act to Leave the Service of Plaintiffs Permanently February 1, 1935. Bill of Complaint III, 2, Page 13

The defendant Railroad Retirement Board by its order no. 2, issued on the 21st day of August 1934, and addressed to all carriers subject to the Railroad Retirement Act, and by the questionnaire thereto attached, called upon all said carriers to furnish, on or before the 15th day of September 1934, the name and address, date of birth, and position, together with other information, of every employee in the service of such carrier on or after June 27, 1933, who at the time of such order was living and who was born on or before February 1, 1865; that is, of all such employees who will have reached the age of seventy on or before February 1, 1935. The said order and questionnaire further required each said carrier, as to each said employee, to state whether or not, in the carrier's opinion, the employee occupied an official position, and, further, to state if the employee was in service on the date of the order; if not, when and why he left the service; and if retired, whether he was receiving a pension or monthly allowance from the carrier.

At the time of the preparation of affiant's first affidavit of September 17, 1934, the returns to the Railroad Retirement Board's order no. 2 and accompanying questionnaire were not complete and were not available to affiant. Accordingly, affiant there made an assumption that the completed returns of the carriers to defendant Retirement Board pursuant to its order no. 2 would show that there were in August 1934 in the employ of the plaintiffs in this cause more than 9,500 persons seventy years of age or more, other than those in official positions, whom Section 4 of the Act itself will require to leave the service of the plaintiffs permanently on February 1, 1935.

Following the execution of affiant's first affidavit on the 17th day of September 1934, and since that date, affiant, as Director of the Bureau of Railway Economics, has received from 127 of the plaintiffs in this cause true copies of their detailed returns to defendant Retirement Board's questionnaire which accompanied said Board's order no. 2, only 9 of the plaintiff's in this cause having failed to furnish affiant copies of said returns at the time of the execution of this supplemental affidavit.

These 127 plaintiffs have reported that they had in their employ a total of 13,153 persons seventy years of age and over.

Affiant shows that the returns of said 127 plaintiffs to order no. 2 further shows that 4[illegible] of said 13,153 employees seventy years of age and over are believed by plaintiffs to be occupying official positions within the meaning of the Railroad Retirement Act, and will not, therefore, be required to leave the employ of plaintiffs permanently

of February 1, 1935. Deducting said 457 officials from the foregoing aggregate of 13,153, the remainder is 12,696.

Affiant shows that he has made further analysis of the 12,696 employees not occupying official positions, who, according to these returns, will be required under the Act itself to permanently leave the service of plaintiffs on February 1, 1935. Affiant shows that 10,354 of the 12,696 such employees were born on or before August 1, 1864, and were, therefore, seventy years of age or over on or before August 1, 1934, the effective date of the Act. Of said 10,354 employees, 6,300 were still in active service of the reporting plaintiffs, 1,301 were reported as having left active service, but without any pension or monthly allowance, while the remaining 2,753 employees were reported as having left active service with pension or monthly allowance.

Affiant further shows that of the 12,696 said employees, not occupying official positions, whom Section 4 of the Act itself will require permanently to leave the service of plaintiffs on February 1, 1935, a total of 2,342 were born during the six months from August 1, 1864, to February 1, 1865. Said 2,342 employees had not reached the age of seventy years on August 1, 1934, the effective date of the Act, but will have reached the age of seventy on or before February 1, 1935. Of the said 2,342 employees, 1,992 were still in the active service of the reporting plaintiffs, 139 had left active service without pension or monthly allowance, while the remaining 211 had left active service with pension or monthly allowance.

Using the foregoing figure of 12,696, taken from said official returns, in the place of the figure of 9,500 involved in said assumption made by affiant in his said original affidavit, affiant now shows that the aggregate contributions of said 12,696 such employees to the railroad retirement fund under the Act would be, at the maximum, 2 percent of $175 per month, times 6 months, times 12,696 employees, or $266,616.

Using the foregoing figure of 10,354, taken from said official returns, in the place of the figure of 9,500 involved in said assumption made by affiant in his said original affidavit, affiant now shows that the aggregate contributions of said 10,354 such employees to the railroad retirement fund under the Act would be, at the maximum, 2 percent of $175 per month, times 6 months, times 10,354 employees, or $217,434.

II

Supplement to Affiant's Second Original Affidavit Showing Responses to Two Questionnaires

Affiant here refers to his second original affidavit made in this cause and executed by him on the seventeenth day of September 1934, in which affiant stated the results of two questionnaires sent out by him to the plaintiffs under instructions of counsel for the plaintiffs, the first of said questionnaires calling for reports showing the number of employees receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof, and the second of said ques-

tionnaires calling for report from plaintiffs as to number of employees who left carrier service within the year July 1, 1933, to July 1, 1934, and have not returned to such service, other than those removed by death, in answer to two questions: (1) The number who left carrier service? (2) In your best judgment, how many of those included in the answer to question (1) will not return to your service?

Beginning at the bottom of page 2 of said original affidavit and continuing to page 5 thereof affiant set out the results of the returns to the first of said two questionnaires as of the 17th day of September 1934, at which time 124 of the plaintiffs had made returns to said questionnaire. Affiant now says that, as of the date of the execution by him of this supplemental affidavit, returns have been made to him by 130 of the plaintiffs, and the revised results of said returns of 130 plaintiffs, including the 124 previously shown in said original affidavit, are now as follows:

Report of 130 Plaintiffs Showing Number of Employees Receiving Pay During Month of May 1934 Not Engaged in Interstate Commerce or in Work so Closely Related Thereto as to be a Part Thereof

Class of duties in which exclusively engaged:	Number
1. Executive and General Officers	6,779
2. Finances, custody and administration of securities or funds	3,663
3. Corporate proceedings or records	302
4. Real Estate, taxes and titles	1,179
5. Experimentation and Research	771
6. Claims and litigation	5,651
7. Accounting	37,202
8. Advertisement, industrial development and traffic solicitation	19,651
9. Management, operation, care or protection of buildings or lands not devoted to or used in connection with transportation	3,020
10. Work relating to the construction of buildings and lines of railway	9,576
11. Work relating to the construction of new equipment	2,984
12. Work relating to reconstruction or major repair of equipment withdrawn from transportation service	88,451
13. Foremen and laborers in stores, reclamation and timber trenting plants	17,476
14. Storekeepers, sales agents, and buyers	7,694
15. Pumping equipment operators, stationary engineers and firemen, oilers, coal passers, and water tenders	6,928
16. All other employees not engaged in interstate commerce not included in the preceding classes, with such explanation as may be needed	10,562
Total number not engaged in interstate commerce	221,880

NOTE.—There are included in each class not engaged in interstate commerce the office and clerical assistants employed in connection with the work indicated.

Affiant further refers to page 7 of said original affidavit of September 17, 1934, where he set out the results as of that date of the responses by 123 of the plaintiffs to the said questionnaire no. 2 as to employees who had left service and the number not expected to return. Affiant now shows that he has, by the date of the execution of the present affidavit, received returns from 130 of the plaintiffs in response to said questionnaire no. 2, being the same 130 above referred to, and has tabulated and totaled the responses as to all,

including the 123 previously shown in his said original affidavit; and that on the basis of said returns up to date, as to the total of 130 plaintiffs who have reported to affiant, 131,717 employees left carrier service within the year July 1, 1933, to July 1, 1934, other than those removed by death, and have not returned to such service; and that of that total number of 131,717, in the expressed best judgment of the reporting officers of said plaintiffs, a total of 80,106 will not return to the service of said carriers but have permanently left the said service.

III

Further Supplemental Questionnaire as to Employees Reported as not Engaged in Interstate Commerce or in Work so Closely Related thereto as to be a Part Thereof

Affiant again refers to his prior affidavit in this cause signed and executed by him on September 17, 1934, setting out the results to that date of responses by plaintiffs to the affiant's two questionnaires of August 31, 1934, attached as Exhibit A to said affidavit, and also refers to the supplemental information with regard thereto hereinbefore set out.

After the said questionnaires of August 31, 1934, had been sent out by affiant, the Committee of Counsel representing the plaintiffs in this cause requested the affiant to send to all of the plaintiffs a further letter questionnaire to elicit certain particular further information as to employees reported by said plaintiff companies as not engaged in interstate commerce pursuant to the first questionnaire of August 31, 1934. For this purpose affiant, on September 14, 1934, sent to each of the plaintiffs a questionnaire in letter form as set out in the copy thereof hereto attached and marked Exhibit A to this affidavit.

Up to the date of the execution of this affidavit affiant has received responses to said letter of September 14, 1934, from 125 of the plaintiffs in this cause, showing totals as follows:

First: Those engaged in actual traffic solicitation (not including their clerks and stenographers)	8,506
Second: Reconsignment and diversion clerks	181
Third: Employees in backshops who interchangeably do running repair work	1,958
Fourth: Research or testing employees who test locomotives or cars not withdrawn from service, or bridges and like structures, and track in place	113
Fifth: Train auditors checking passengers and fare collections on trains	25
Grand total of all affirmative responses of 125 railroads to all 5 items	10,782

JAMES H. PARMELEE,
Director Bureau of Railway Economics.

WASHINGTON, D. C.

Subscribed and sworn to before me this 22nd day of September 1934.

[SEAL]

MABY T. KINNEY,
Notary Public.

My commission expires October 3, 1938.

EXHIBIT A

BUREAU OF RAILWAY ECONOMICS,
TRANSPORTATION BUILDING,
SEVENTEENTH AND H STREETS, NW.,
Washington, D. C., September 14, 1934.

DEAR SIR: In connection with my letter of August 31, and the report made by you pursuant thereto "showing number of employees receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof."

If you included in your report as "not engaged in interstate commerce" any officers or employees whose work comes within any of the following five classes, please so report to me by wire, stating how many as to each:

First. Those engaged in actual traffic solicitation (not including their clerks and stenographers).

Second. Reconsignment and diversion clerks.

Third. Employees in backshops who interchangeably do running repair work.

Fourth. Research or testing employees who test locomotives or cars not withdrawn from service, or bridges and like structures, and track in place.

Fifth. Train auditors checking passengers and fare collections on trains.

If no such employees were included in your report, please wire to that effect.

In answering you may refer to the above subdivisions by number.

Very truly yours,

JULIUS H. PARMELEE,
Director.

Plaintiffs' Exhibit 4

AFFIDAVIT

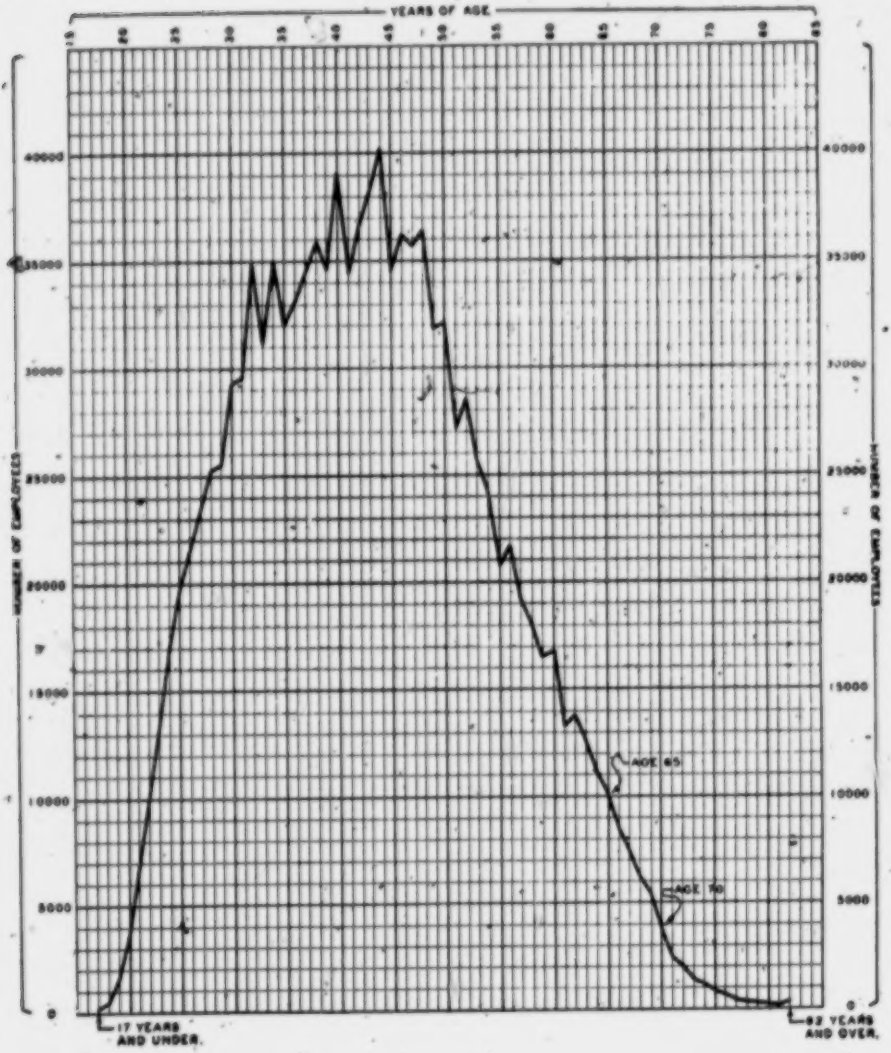
DISTRICT OF COLUMBIA,
City of Washington, ss:

JULIUS H. PARMELEE, being first duly sworn, deposes and says:

He is the same Julius H. Parmelee who made an affidavit in this cause, executed by him on the 17th day of September 1934, and he has the experience and qualifications therein set forth. He makes this affidavit as a supplement to the said affidavit and merely to illustrate graphically the statistics contained and embodied in Exhibit A to said former affidavit, the table showing the results of his study of 129 Class I railroads described in said former affidavit. He makes the present affidavit with knowledge that it is to be used in evidence in the above-entitled cause.

To illustrate the statistics contained in said Exhibit A, and based solely thereon, affiant has prepared a graphic chart, attached hereto and marked "Exhibit X" to this affidavit. It is correctly prepared and accurately illustrates the statistics contained in said study of 129 railroads by showing the age distribution of the 1,215,897 employees

EXHIBIT X


YEARS OF AGE
NUMBER OF EMPLOYEES
40000
35000
30000
25000
20000
15000
10000
5000
0
AGE 65
AGE 70
17 YEARS AND UNDER
82 YEARS AND OVER

covered by said study. The numbers on the right and left margins of the graph show the numbers of employees by thousands. The numbers along the upper margin show the years of age of employees. The heavy black line shows the total number of employees of said 129 carriers at each age, and there are included below said line the total of 1,215,897 at all ages, beginning with 17 and under at the left and ending with 82 and over at the right.

The graph shows the relation of the total number of such employees of age 65 years or over to the total number thereof younger than 65. It similarly shows the relation of the total number thereof of age 70 years or over to the total of all 1,215,897 and to the total number thereof younger than 70.

The graph illustrates the statistics contained and presented in Exhibit A to affiant's affidavit of September 17, 1934, by showing, for instance, the following age distributions of the total of 1,215,897 employees:

1. Under 65—1,164,187, or 95.7%.
2. 65 or over—51,710, or 4.3%.
3. Under 70—1,201,936, or 98.8%.
4. 70 or over—13,961, or 1.2%.
5. 35 to 49, both inclusive—533,749, or 43.9%.
6. 30 to 54, both inclusive—831,746, or 68.4%.
7. 25 to 59, both inclusive—1,043,601, or 85.8%.
8. 30 to 49, both inclusive—693,825, or 57.1%.
9. 32 to 47, both inclusive—566,579, or 46.6%.
10. 25 to 54, both inclusive—947,178, or 77.9%.

(Signed) JULIUS H. PARMELEE,
(Affiant)
Director Bureau of Railway Economics, Washington, D. C.

Subscribed and sworn to before me this 28th day of September 1934.

[SEAL] MARY T. KINNEY,
Notary Public.

My Commission expires Oct. 3, 1938.

It was stipulated and agreed of record between the parties that the plaintiffs had, prior to the hearing, tendered to the defendants all the basic affidavits and returns to questionnaires referred to and used as sources by the witness Parmelee in his foregoing affidavits, and that the defendants had had an opportunity to examine and check the same. Plaintiffs' counsel stated that these basic affidavits would be introduced in evidence if requested by defendants, but that in the absence of such request plaintiffs would not offer them, so as not to encumber the record unnecessarily. Defendants did not request their introduction.

It was stipulated between the parties that the legend on the lower right-hand corner of the long chart, attached to Parmelee affidavit 1, Plaintiffs' Exhibit 1, and reading "corrected to January 25, 1933", did not mean that the facts embodied in the chart had been brought up to that date but meant only that some corrections were made on that date, removing a few minor inaccuracies that appeared at the time the chart was originally prepared.

Plaintiffs offered in evidence the following affidavits, identified as Plaintiffs' exhibits Nos. 5 to 34, respectively:

Plaintiffs' Exhibit 5

AFFIDAVIT

Filed Oct. 11, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

C. D. MACKAY, being first duly sworn, deposes and says;

That he is Assistant Vice President of the Southern Railway Company, one of the plaintiffs in the above-entitled cause, and makes this affidavit on the basis of his own personal knowledge, except as to numbers of employees engaged in a particular employment at a particular time, statements as to which are necessarily made on information and belief and based on reports officially made to affiant in regular course of company business by subordinates themselves having personal knowledge; and affiant makes this affidavit with full knowledge that it is to be used as evidence in said cause.

That the affiant entered the service of the Southern Railway Company as clerk in the freight station at Raleigh, North Carolina, in 1901; that since that time he has been employed as clerk in the office of Master Mechanic; clerk in the office of the First Vice President; Secretary to the Assistant to the First Vice President; Secretary to First Vice President; Secretary of Southern Railway subsidiary companies; Vice President of certain affiliated companies of the Southern Railway Company; Assistant to Vice President in Charge of Operation; and Assistant Vice President, which position he now occupies; that for the last thirteen years, among his other duties, he has been in charge of personnel, and in the discharge of his duties in that capacity has come in contact and is generally familiar with the duties of officers and employees in all departments.

Affiant has before him an affidavit in the above-entitled cause, made also by affiant, and the report thereto attached of Southern Railway Company showing number of employees receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof. That report classifies those employees so reported as not engaged in interstate commerce or in work so closely related thereto as to be a part thereof into sixteen different classes or groups.

This affidavit describes and explains the duties and the work in which they are engaged of the officers and employees of Southern Railway Company grouped and reported under each of said sixteen headings, and affiant states that no one of such officers or employees has duties or performs work connected with operation or transportation.

1. Executive and General Officers

There are included in this group the President, the Assistant to President, and the various Vice Presidents other than the Vice President in Charge of Operation, together with their assistants and their staff officers, and their clerical, stenographic, and similar members of their staffs.

The President is a member of the Board of Directors, Chairman of the Executive Committee, and is the chief executive officer of the Company, reporting only to the Board of Directors. He has general charge of all the business and affairs of the Company. He has the decision on matters of general policy, the control and the power of appointment and removal of all officers and heads of departments.

The Vice President in Charge of Operation, his assistants and staff, including General Managers, Superintendents, other staff officers, clerical, secretarial, and other forces employed in connection with operation, have not been reported as not engaged in interstate commerce.

The other Vice Presidents are executive officers, subordinate to the President, in charge respectively of various departments of the railroad: the Vice President in Charge of Finance, Construction, and Purchases; the Vice President in Charge of Traffic; the Vice President in Charge of Taxes, Fuel Purchases, Publicity, and Resident Executive Officer in the South; and the Resident Vice President in the West, who is in charge of intercompany and public relations in his immediate territory.

The Vice President in Charge of Finance, Construction, and Purchases, as the title indicates, is in general charge of finances, of new construction, and of the purchasing department.

The Vice President in Charge of Traffic is charged with the direction of solicitation of freight and passenger traffic and the making and publication of rates.

The Vice President in Charge of Taxes, Fuel Purchases, Publicity, and Resident Executive Officer in the South, has duties connected only with the matters indicated by his title.

The Resident Vice President in the West has charge of public relations in that territory and handles matters relating to relations between lessor and lessee lines of railroad.

In addition to the foregoing individual executive officers, there have been classified under group No. 1 the assistants and clerical and stenographic staffs of each of said officers, whose duties are confined as are those above described for the executive officers, and who handle only such matters as come within the jurisdiction of their respective departments under the above description given for the head of each such department.

There are also included in this group such officers as Architects and Consulting Architects, Valuation Engineer, Engineer of Construction, and other office engineers whose duties are confined to new construction work and do not relate to maintenance of property in transportation service. Their office, engineering, clerical, and other assistants have been included under group No. 10, and not under this group.

2. FINANCES, CUSTODY, AND ADMINISTRATION OF SECURITIES OR FUNDS

There are included in this group the Treasurer, the Paymaster, and their staff and clerical and stenographic forces, as well as the cashiers and assistant cashiers at larger stations, whose duties are the handling of company funds at said stations, together with the cashiers and assistant cashiers in the office of the Treasurer. As indicated by the title of this group, all of those included have duties

confined to finances, the receipt, handling, and disbursement of funds, the accounting for the same, and the custody and administration of securities or of funds.

3. Corporate Proceedings and Records

There are included in this group the Secretary and the Assistant Secretaries, as well as their clerical, stenographic, and other assistants. Their duties, as indicated by this title, are confined to the recording and custody of minutes of the Board of Directors and of the stockholders; the serving of notices of meetings to directors, stockholders, and members of committees; the custody and preservation of corporate proceedings and records; the keeping of stock and transfer books; and the custody and affixing to documents of the corporate seal.

4. Real Estate, Taxes, and Titles

There are included in this group all of those employees whose duties are exclusively confined to the handling of matters relating to real estate, to land titles, to taxes, and to the drafting and preparation of contracts and agreements relating to lands and such matters.

5. Experimentation and Research

There have been included under this group the Superintendent of Tests and his technical, clerical, and other assistants. Their duties are exclusively confined to scientific investigation, experimentation, and technical research, including the testing of materials, fuel, etc.

6. Claims and Litigation

There are included in this group all full-time employees in the law department, including the claim department and the loss-and-damage claim department, and the medical department.

Under the law department there are included the General Counsel, the General Solicitors, the General Attorney, the Solicitors, and the law clerks in the law department, together with their stenographic and other assistants; the Chief Surgeons; the Chief Claim Agent and the Claim Agents; the General Freight Claim Agent and other Loss-and-Damage Claim Agents, together with all of their clerical and stenographic assistants. This includes all members of the law department in the general offices. It does not include Division Counsel for the respective states, Assistant Division Counsel, Special Counsel, and Local Counsel or Local Surgeons. These are not deemed to be employees under the Retirement Act. They are all lawyers and doctors in general practice, not employed for full-time service by the railroad. If such counsel and surgeons are held to be employees within the terms of the Act, the aggregate number reported under this head would be increased by at least 1,196.

There have, however, been included within this group certain chief clerks, clerks, and stenographers who are employees of the railroad and are by it furnished as assistants to Division Counsel, Assistant Division Counsel, or Special Counsel.

The full-time employee members of the law department who are included in this group have duties exclusively confined to the investi-

gation and determination of questions of law, the rendering of opinions, and to the handling and supervision of the handling of claims and suits in the courts.

The Chief Claim Agent and the other Claim Agents, herein included, have duties exclusively relating to the investigation, handling, and settlement of claims and to the assistance of counsel in litigation.

The General Freight Claim Agent and the other Freight Claim Agents and their clerical and other assistants have duties exclusively confined to the handling and settlement of claims arising out of loss and damage to freight.

7. Accounting

The head of the accounting department is the Comptroller, and since his duties are exclusively confined to accounting, he and his assistants and their clerical and stenographic staffs have been included hereunder instead of under group No. 1, Executive and General Officers, although the Comptroller is an executive officer elected by the Board of Directors and reporting directly to the President.

In addition to the foregoing, there have been included under this group the General Auditor, the Assistant General Auditor, the Auditor, the Assistant to Comptroller, the Auditor of Disbursements, the Auditor of Joint Facilities, the Auditor of Construction, the Auditor of Terminals, the Auditor of Passenger Accounts, the Auditor of Freight Accounts, the Auditor of Station Accounts, the Auditor of Overcharge Claims, together with their clerical, stenographic, and other assistants.

There are also included all the employees of the Office of Car Records whose duties are exclusively confined to accounting.

The duties of all of those included under this group are exclusively confined to auditing, recording, and preserving of accounts and records, bookkeeping, the making of reports required by law to various regulatory bodies covering matters of accounts and records, the compilation of statistical data, and the making and furnishing of reports regarding such matters to other departments.

8. Advertising, Industrial Development, and Traffic Solicitation

There are included under this group all employees, other than those reported under group No. 1, whose duties are exclusively confined to traffic and traffic solicitation, advertising, and the investigation and promotion of industrial development and location; such as, General Freight Agents, Assistant General Freight Agents, Freight Traffic Representatives, the Land and Industrial Agent, and their clerical, stenographic, and other assistants, whose duties are confined to the same matters.

9. Work Relating to the Management, Operation, Care, or Protection of Buildings and Lands Not Devoted to or Used in Connection with Transportation

Under this group the following have been considered buildings not devoted to or used in transportation: general office buildings, buildings owned by the carrier which are rented or leased to others,

buildings owned by others and leased by the carrier, or buildings owned by the carrier when not used for purposes directly connected with operation or transportation.

In this group are included the superintendents of such buildings and the forces engaged in their operation, such as electricians, watchmen, switchboard operators, messengers, janitors, elevator operators, cleaners, porters, and charwomen.

There have also been included those employees whose duties and work are exclusively confined to the supervision, control, forestry cultivation, and protection of lands owned by the carrier but not devoted to railroad operation or transportation.

The duties of all in this group are confined to the operation, care, development, or protection of such buildings and lands not devoted to or used in connection with transportation or operation of the railroad.

10. Work Relating to the Construction of Buildings and Lines of Railway

There are included in this group employees in the office of the Chief Engineer, other than those reported under group No. 1, such as are exclusively engaged in work relating to construction either of buildings or of new lines of railroad, as distinguished from work connected with the repair or maintenance of existing operating properties. This includes Assistant and Junior Engineers engaged in construction and valuation work and draftsmen.

11. Work Relating to the Construction of New Equipment

No employees have been reported under this group, since the Company at this time is constructing no new equipment.

12. Work Relating to Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service

There are included in this group employees in the maintenance-of-equipment departments who are engaged in classified repairs to or reconstruction of equipment withdrawn from service, such as locomotives, cars, platform trucks, frogs, and switches, etc., as distinguished from employees engaged in temporary or running repairs to equipment which has not been withdrawn from transportation.

13. Foremen and Laborers in Stores, Reclamation, and Timber Treating Plants

There are included under this group the foremen and laborers in the stores and reclamation department. Their duties are exclusively confined to the handling, care, custody, and distribution of materials and supplies not yet devoted to transportation, and to the handling and reclamation of scrap or usable parts withdrawn from transportation service.

14. Storekeepers, Sales Agents, and Buyers

There are included in this group the General Storekeeper, the Division Storekeepers, the Purchasing Agent, the Stationer, the Fuel Agent, the Tie and Timber Agent, the Tie and Timber Inspectors, their clerical, stenographic, and other assistants. Their duties are exclusively confined to the inspection, selection, purchasing, keeping, and issuing of materials and supplies not yet incorporated into operating properties or devoted to transportation.

15. Pumping Equipment Operators, Stationary Engineers and Firemen, Oilers, Coal Passers, and Water Tenders

There are included under this group pumping equipment operators and pumpers, engaged in pumping water to storage tanks, stationary engineers and firemen, steam equipment oilers, coal passers, and water tenders.

There are not included under this group any employees, even though they might seem to fall within the descriptive terms of the title, whose work is in connection with the delivering of water from storage tanks to locomotives in operation or to the firing, oiling, coaling, or tending of equipment in operation and transportation service.

16. All Other Employees Not Engaged in Interstate Commerce Not Included in the Preceding Classes

There are included in this group the Superintendent, Inspectors, and Captains of Police, and their clerical and office assistants, employees engaged in the beautification of station yards and premises, shop watchmen, and watchmen at coal piers and other places for the storage of materials and supplies not yet devoted to transportation.

The duties of the Superintendent, Inspectors, and Captains of Police are supervisory, their function being to direct the policing of the Company's property. The men directly engaged in policing transportation and operation service; such as lieutenants, patrolmen, etc., have not been included.

The persons engaged in the beautification of station grounds, etc., furnish seed, outline landscaping, and do other work of that character which improves the appearance of the property.

This Affidavit Also Descriptive of Corresponding Classes of Employees of Affiliated Lines

Affiant is also Assistant Vice President of certain railroad companies affiliated with Southern Railway Company and with it comprising Southern Railway System, to wit: The Alabama Great Southern Railway Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; Georgia Southern and Florida Railway Company; New Orleans and Northeastern Railroad Company; and Northern Alabama Railway Company, all likewise plaintiffs in this cause.

All of the aforesaid affiliated companies are operated together with Southern Railway Company as one operating system. Affiant is in

charge of personnel as to each of said affiliates, with duties and jurisdiction the same as in case of Southern Railway Company, and for each of them he has also made an affidavit covering a report, prepared under his supervision and direction, showing, for each said affiliated line, the number of its employees receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof.

And affiant states that as to many of the sixteen classes of employment the same individuals who are reported for Southern Railway Company are likewise officers or other employees of the said affiliated lines having duties and work of the same character as for Southern Railway Company. In all such cases such officers and employees have only been included and counted in the report of Southern Railway Company.

As to those officers and employees who have been reported under respective classes by each of said affiliated companies, they are employees solely of such affiliated company, but affiant states that their duties and work are in general identical in character as to each reported group as in the case of the corresponding group reported for Southern Railway Company, and the description hereinbefore made of the duties and work of each group for Southern Railway Company applies with equal force to the corresponding group of each said affiliate.

C. D. MACKAY,
(Name of affiant)
Assistant Vice President,
(Title)
Southern Railway Company.
(Full name of company)

Subscribed and sworn to before me this 15th day of September 1934.

[SEAL] PAUL K. HOWARD,
Notary Public.

My commission expires May 24, 1935.

Plaintiff's Exhibit 6

AFFIDAVIT

Filed October 11, 1934

STATE OF ILLINOIS,
County of Cook, ss:

The undersigned, L. S. Taylor, Vice President of The Pulman Company, being first duly sworn, deposes and says that for many years he has been fully acquainted with the duties of officers and employees of The Pullman Company in their performance of their work; that he has examined and is familiar with the annexed report showing number of employees not engaged in interstate commerce work; that the duties of the classes of employees listed in said report are as follows:

1. Executive and General Officers: These embrace officers not directly engaged in the operation of cars. Their duties and the nature of work performed are to direct and manage the Company's busi-

ness and property and to administer the affairs of the corporation conducting the business and owning and using the property.

2. Finances, custody, and administration of securities or funds: These embrace officers and clerical forces in the office of the Company's Treasurer and local Receiving Cashiers in various district offices. Their duties are to receive and have custody of money, securities, and funds owned by the Company.

3. Corporate proceedings or records: These embrace officers and clerical employees in the office of the Secretary of the Company. Their duties are to keep and have custody over the Company's corporate records.

4. Real estate, taxes, and titles: No officers or employes are specifically assigned to work involving real estate and titles, such transactions being handled by executive, accounting, and law officers and employes. The duties of those handling taxes are to make reports of the Company's property for assessment in the various taxing jurisdictions, to receive and check bills for taxes when presented, and to make remittances for such bills after accounts are audited and vouchers issued.

5. Experimentation and Research: These embrace a general officer and other officers and clerical forces in the Engineering Bureau engaged in experimentation and research pertaining to cars and other facilities of the Company.

6. Claim and litigation: These embrace officers, clerical forces, and investigators in and under supervision of the Law Department. Their duties are to investigate and settle claims and conduct litigation arising out of the operation of the Company's business.

7. Accounting: These embrace general and other officers and clerical forces in the various branches of the Company's Accounting Department. Their duties are to administer and keep the accounts and have custody over accounting records of the Company.

8. Advertisement, industrial development, and traffic solicitation: No officers or employes are assigned to this class of employment.

9. Management, operation, care, or protection of buildings or lands not devoted to or used in connection with transportation: The management, control, and custody of buildings and lands are under the supervision of general officers of the Company. In the operation and care of buildings the employes in this classification consist principally of telephone switchboard operators and watchmen.

10. Work relating to the construction of buildings and lines of railway: No officers or employes are assigned to this class of employment.

11. Work relating to the construction of new equipment: No officers or employes are assigned to this class of employment.

12. Work relating to reconstruction or major repair of equipment withdrawn from transportation service: These embrace officers and employes in the Company's several repair shops, making classified repairs to equipment. Such repairs constitute major repairs necessitating work on equipment over a considerable period of time during which it is withdrawn from service and operation and other equipment is substituted in place of the cars so withdrawn.

13. Foremen and laborers in stores, reclamation, and timber-treating plants: These consist principally of laborers in the various

storerooms of the Company's Stores Department located in the repair shops.

14. Storekeepers, sales agents, and buyers: These embrace officers and clerical employes in the Purchasing Department and the General Storekeeper's office; also local storekeepers and their clerical forces in storerooms in the various districts and repair shops. The duties of purchasing officers and employes are to purchase materials and supplies, and the duties of stores officers and employes are to have custody of such materials and supplies.

15. Pumping equipment operators, stationary engineers and firemen, oilers, coal passers, and water tenders: Employes of these classes consist entirely of stationary engineers and firemen in the various repair shops.

16. All other employes not engaged in interstate commerce not included in the preceding classes, with such explanation as may be needed: This class consists entirely of laundry employes in the company's various laundries. Their duties embrace laundering of linen and cleaning and renovation of blankets, curtains, etc., used in cars.

The information hereinabove stated is based upon affiant's personal knowledge of the affairs and business of The Pullman Company and of the work of its officers and employes, and this affidavit is made with the knowledge and intent that it shall be used in evidence in the trial of the above-entitled cause, or any hearing that may be held therein.

L. S. TAYLOR,
THE PULLMAN COMPANY,
79 East Adams Street, Chicago, Illinois.

Subscribed and sworn to before me this 11th day of September 1934.

[SEAL] A. W. LORENZ,
Notary Public.

My Commission expires September 22, 1935.

REPORT OF

The Pullman Company
(Name of plaintiff company in full)

Showing Number of Employees Receiving Pay During Month of May 1934 Not Engaged in Interstate Commerce or in Work so Closely Related Thereto as to be a Part Thereof

Class of duties in which exclusively engaged:	Number
1. Executive and General Officers	42
2. Finances, custody, and administration of securities or funds	109
3. Corporate proceedings or records	4
4. Real Estate, taxes, and titles	2
5. Experimentation and Research	24
6. Claims and litigation	23
7. Accounting	627
8. Advertisement, industrial development, and traffic solicitation	-----
9. Management, operation, care, or protection of buildings or lands not devoted to or used in connection with transportation	39
10. Work relating to the construction of buildings and lines of railway	-----
11. Work relating to the construction of new equipment	-----

Class of duties in which exclusively engaged—Continued.	Number
12. Work relating to reconstruction or major repair of equipment withdrawn from transportation service	4,815
13. Foremen and laborers in stores, reclamation, and timber-treating plants	89
14. Storekeepers, sales agents, and buyers	356
15. Pumping equipment operators, stationary engineers and firemen, oilers, coal passers, and water tenders	38
16. All other employees not engaged in interstate commerce not included in the preceding classes, with such explanation as may be needed	543
Total number not engaged in interstate commerce	6,711

NOTE.—There is included in each class not engaged in interstate commerce the office and clerical assistance employed in connection with the work indicated.

(Signed) E. C. MORRIS,
(Signature of affiant)
Comptroller.
(Title)

Plaintiffs' Exhibit 7

AFFIDAVIT

Filed October 11, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss.

Mr. J. GORMLEY, being first duly sworn, deposes and says:

Affiant is President of the American Railway Association, with offices in Washington, D. C.

Affiant entered service of the Chicago and Northwestern Railroad in 1893 in the Maintenance of Way Department. He served in various capacities in that department, later in the Operating and Executive Departments. He was appointed General Agent, American Railway Association, in 1917. He has served as Assistant to Regional Director, Western Region, and later as Assistant Regional Director, Northwestern Region, United States Railroad Administration. Affiant was Director, Division of Transportation, American Petroleum Institute, in 1920 and 1921. From 1921 to April 1, 1933, affiant served as Chairman Car Service Division and Executive Vice President, and since April 1, 1933, he has been President of the American Railway Association. Affiant makes this affidavit with knowledge that it is to be used as evidence in the above-entitled cause.

I

Affiant has read the affidavits in this case of A. L. Conrad, Assistant General Auditor of The Atchison, Topeka & Santa Fe Railway Company; or Robert B. Ferguson, Comptroller of The Delaware, Lackawanna & Western Railroad Company; or H. F. Thompson, Assistant Comptroller of Louisville & Nashville Railroad Company; of John G. Walber, Vice President in Charge of Personnel of The New York Central Railroad Company; of F. C. Sharood, Assistant General Auditor of Northern Pacific Railroad Company; of H. A. Enochs, Chief of Personnel of The Pennsylvania Railroad; of L. S.

Taylor, Vice President of The Pullman Company; and of C. D. Mackay, Assistant Vice President of Southern Railway Company; in which the said affiants, for their respective companies, describe and explain the duties and the work of officers and employees of their companies under the various classes or groups, sixteen in number, reported as not engaged in interstate commerce or in work so closely related thereto as to be a part thereof, and this affiant is familiar with the contents of said eight affidavits. Based upon his experience and knowledge of railroad organization and of railroad business throughout the United States, his many years of experience in the railroad business and of contacts with the organizations of the Class I railroads of the United States, this affiant says that the descriptions and explanations set forth in the said eight affidavits above referred to of the duties and work of the various officers and employees therein described under the said sixteen groups are reasonably typical and representative of the organization of Class I railroads of the United States in general. And affiant knows that all of the Class I railroads of the United States have many officers and employees whose duties and work are the same as, and exclusively confined to, those of many of the individual positions and classes described in the said eight affidavits, and who do not have any duties or work concerning transportation or operation of their respective railroads.

Affiant further states that the said seven railroads (excluding The Pullman Company), to wit: The Atchison, Topeka & Santa Fe Railway Company, The Delaware, Lackawanna & Western Railroad Company, Louisville & Nashville Railroad Company, The New York Central Railroad Company, Northern Pacific Railroad Company, The Pennsylvania Railroad, and Southern Railway Company, represent 21 percent of the total operating mileage of all Class I railroads of the United States and employ 33 percent of the total of employees of all Class I railroads of the United States.

II

Efficiency and Economy of Steam Railway Operations

The railroads of the entire country in 1929 handled 450 billion ton-miles of revenue freight and 31 billion revenue passenger-miles. This service was so effectively rendered that the physical plant was at no time taxed to its maximum strength, indicating the presence of a normal transportation reserve essential at all times to the economic welfare of the nation. The dispatch and efficiency with which this peak traffic was handled, compared with the chaotic conditions of post-war years up to 1923, is a matter of general knowledge.

The decline in traffic, which set in during the late months of 1929 and which continued unabated to the early Spring of 1933, reduced the volume of railroad traffic to less than 50 percent of the 1929 performance. Revenues proportionately declined. Required by law to furnish adequate, efficient, and safe services at all times, the railroad industry not only maintained the high operating standards of 1929, but conditions made it imperative to even surpass those

standards in many respects, in order to keep expenses within the limits dictated by the 50-percent decline in revenues. That this was accomplished can be attributed largely to the continued application by railroad management of efficient and economical methods of operation.

Considering efficiency and economy of railroad transportation from the standpoint of the user of such services, two questions may be asked: (1) Has service been improved? (2) Has the cost of transportation been reduced?

First, with regard to service, the average speed between terminals of freight trains in 1923 was 10.9 miles per hour; in 1929, 13.2 miles per hour; in 1933, 15.7 miles per hour. Comparing the last-named year with 1923, the relative increase for the eleven-year period was 44.0 percent, and compared with 1929 the increase was 18.9 percent. These results were achieved by the use of more modern and speedier locomotives, by the better conditioning of equipment units, and by improvements to roadbed and track.

The increase in speed of freight-train movements was, of course, accompanied by an increase in the dispatch of tonnage movements. Excluding the weight of locomotive and tender, each freight train-hour in 1923 produced 16,764 gross ton-miles; in 1929 produced 24,539 gross ton-miles; in 1933 produced 27,343 gross ton-miles. The relative increase in 1933 was 63.1 percent compared with 1923, and 11.4 percent compared with 1929. Eliminating the weight of all equipment, net ton-miles per freight train-hour increased from 7,770 in 1923 to 10,580 in 1929 and further increased to 10,974 in 1933. The increase in 1933 was 41.2 percent compared with 1923, and was 3.7 percent compared with 1929.

This speeding up of freight movement, more pronounced during the period 1923 to 1929, but continued also during the period of depression, 1930 to 1933, was not only a distinct betterment in the equality of service rendered to the public but also exerted a strong influence on the economy of rail operation.

There have been no car shortages; all traffic demands have been met promptly; accidents have been reduced; in short, the quality of service rendered the public has definitely been improved, not only since 1923 but also during the period of depression.

Second, as to whether the cost of transportation has been reduced, affiant states that, from the standpoint of railway management, the efficiency and economy of operations, aside from the actual physical perfection of performance, is reflected ultimately in the ratio of total expenses to total revenues. It is one of the primary functions of management to retain, if possible, a definite relationship between income and outgo. During periods of declining traffic and revenues railroad managements are called upon to exercise the greatest effort in the direction of efficiency and economy of operation in order, first, that adequate service shall be maintained and, secondly, that the rate of decline in revenues shall be closely approximated by the decline in expenses.

The Interstate Commerce Commission in its annual reports to Congress of the last two years, 1932 and 1933, commented favorably on the ability of railroad management to reduce expenses proportionately to the reduction in revenues.

In its report of December 1, 1932, to the Senate and House of Representatives, the Commission said, pages 1 and 2:

"The railroads have been in general surprisingly successful in reducing their operating expenses in a ratio reasonably close to the reduction in operating revenues. In 1929, which was a very good railroad year, the operating ratio of Class I railroads (including switching and terminal companies) was 71.7 percent. In the 12 months ended with September 1932 it was 78.1 percent, although the 10-percent reduction in wages was applicable to only 7 months of that period."

In its like report of December 1, 1933, the Commission said, on page 2:

"The drastic curtailment of operating expenses made in 1931 and 1932, almost in proportion to revenues, was continued in 1933, with the result that a relatively large recovery in net earnings has appeared in recent months."

To achieve this end has required not only a continuation of the efficiency and economy measures utilized so effectively during the period 1923 to 1929, but has also required wide-spread readjustments and reorganizations of operating policies.

In 1921, a year of business depression, the ratio of operating expenses to operating revenues, Class I railways, was 82.80 percent. The ratio was reduced year by year to 1926, the figure in the last year being 73.14 percent. The ratio rose slightly in 1927 to 74.52 percent, but declined in 1928 to 72.44 percent, and again in 1929 to 71.76 percent. The trend in the ratio turned upward in 1930 and continued upward in 1931 to reach the depression peak of 76.97 percent. In 1932 a slight reduction was recorded, and in 1933 the ratio dropped sharply to 72.66 percent, lower than in any year during the period 1921 to 1933, except for the two years 1928 and 1929. In none of the last four years did the operating ratio reach as high a percentage as that of 1921, 1922, or 1923.

In maintaining the stability of the operating ratio during the past four years of economic depression, the carriers reduced operating expenses by $575,000,000 in 1930, by an additional $708,000,000 in 1931, by an additional $820,000,000 in 1932, and still further by $154,000,000 in 1933. The reduction in 1933, compared with 1929, amounted to $2,257,000,000, or 50.1 percent. This compares with a 50.7 percent decline in revenues.

The extent of the decline in operating revenues may be more readily appreciated when it is pointed out that the aggregate of operating revenues in 1931 was $318,000,000 less than the level of operating expenses in 1929, in 1932 was $1,379,000,000 less than that level, and in 1933 was $1,411,000,000 less.

Added to these difficulties was the fact that revenue per unit of traffic handled steadily dropped during the period. In 1921, the year before the Commission ordered a general 10 percent reduction in freight rates, the carriers received $13.19 in revenue for each 1,000 traffic units (i. e., revenue ton-miles plus three times revenue passenger-miles). This average declined steadily to $11.58 in 1928, rose slightly to $11.62 in 1929, and has since continued to decline, being $10.38 in 1933. This average for 1933 was 21.3 percent lower than that of 1921, and was 10.7 percent lower than that of 1929. Had the 1921 average of revenue per traffic unit been maintained throughout

the period ending with 1933, the revenues of the carriers would have been greater than they were by eight and three-quarters billions of dollars. In the year 1933 alone revenues would have been greater than they were by $838,000,000, or by 27.1 percent.

Transportation expenses of the Class I carriers declined from $2,079,954,026 in 1929 to $1,077,981,936 in 1933, a reduction of 48.2 percent. Decline in the volume of traffic and the use of more efficient and economical transportation methods have been the principal causes of this reduction of more than one billion dollars.

Transportation expenses normally approximate one-half of the total operating expenses of the carriers. Forty percent of the transportation expenses are in road train expenses and fluctuate more or less ratably with the volume of traffic handled. Sixty percent of transportation expenses are more or less fixed, fluctuating to a limited extent in terminals and stations with the volume of business, otherwise fluctuating only with extensive changes in operating methods.

The problem of cutting transportation expenses by a billion dollars has, therefore, been a major one, necessitating considerable readjustment and reorganization of operating plans and methods. The entire handling of the movement of freight has been revolutionized in the last ten years, permitting through operation of trains without yardings and reclassification. Revisions of methods of handling less-than-carload freight, substitution of motor-truck service for peddler freight trains, improved methods of handling cars in yards, and more extensive use of rail motor units in passenger service, are some of the methods employed by railroad managements in recent years to reduce transportation costs.

Reduction in the quantity of fuel consumed per unit of traffic, as well as the more economical and efficient utilization of other materials and supplies, has also been effected by the carriers.

Accordingly, affiant states that, with the railroad plant operating at something less than 50 percent of capacity, railroad managements have produced a quality of service superior to that of 1929 and have kept operating expenses within the limits of operating revenues. This has been achieved by reorganization and readjustment of operating methods, by the continued application of efficiency and economy measures, and by the deferment of some maintenance work.

Upon the basis of his knowledge and experience, and of the foregoing facts, affiant states that transportation by railroad in the United States is now conducted more efficiently than ever before, and that its efficiency has constantly increased for many years.

III

Increased Safety of Transportation

Affiant has read the affidavit of George H. Warfel, Assistant to the Executive Vice President of the Union Pacific Railroad Company, made in this cause, and is familiar with the safety campaign therein referred to, which has been intensively carried on by the railroads of the United States since 1912, and with the results of that campaign and of the improved efficiency of railroad operation on reduction of accidents and increase in safety, as set out in the affidavit of said

Warfel. Since 1921 this safety campaign has been conducted directly under the direction and supervision of the American Railway Association and of its Safety Section. He knows that the said affidavit correctly states the general results in improved safety of transportation. And affiant states upon the basis of his own knowledge of the matters set out in the said affidavit of Warfel that transportation by railroad in the United States is now conducted more safely than ever before and that its safety has constantly increased for many years.

M. J. GORMLEY,
(Name)
President Am. Ry. Association,
(Title)
916 Transportation Bldg., Washington, D. C.
(Address)

Subscribed and sworn to before me this 17th day of September 1934.

[SEAL] MARY T. KINNEY, *Notary Public.*

My Commission expires October 3, 1938.

Plaintiffs' Exhibit 8

AFFIDAVIT

Filed Oct. 11, 1934

STATE OF MINNESOTA,
County of Ramsey, ss:

F. C. SHAROOD, being first duly sworn, deposes and says that he is Assistant General Auditor of Northern Pacific Railway Company, herein called "the carrier"; that he entered railroad service August 1, 1894, as messenger in the telegraph department of the Northern Pacific Railroad Company; that from that date until November 1905 he was a clerk and chief clerk in the store, operating, and accounting departments of the Great Northern Railway Company, the Chicago Great Western Railway Company, and the Northern Pacific Railway Company; that from November 1905 to February 1909 he was auditor for the construction department of the Virginian Railway Company; that from February 1909 to December 1919 he was examiner, accountant, and district accountant for the Interstate Commerce Commission; that from January 1920 to date he has been Assistant General Auditor for the Northern Pacific Railway Company and in that capacity he has for the past six years been in direct charge of the statistical section of the Accounting Department in which all force and compensation reports to the Interstate Commerce Commission and the United States Board of Mediation are prepared and data for use in service, rate, and tax proceedings are compiled; that he made that certain affidavit, subscribed and sworn to on September 7, 1934, with respect to the number of employees of the carrier receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof; that this affidavit is made for the purpose of explaining with greater detail the character of the service rendered by the employes referred to in said affidavit; that the explanation is as follows:

The attached statement entitled "Detail of statement showing number of employees receiving pay during month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof" lists officers and employees under 13 separate groups, numbered 1 to 9, inclusive, and 12 to 15, inclusive, and classifies each and every person in each group according to his title and character of his work.

Group 1 is made up of Executive and General Officers and the President's Office Force.

The President has general control and direction of the business of the company and, subject to the approval of the Board or the Executive Committee, fixes the general policy of the company. The President also acts as Chairman of the Board of Directors and presides at all meetings of the Board, the Executive Committee, and the Stockholders. The Vice Presidents, the Vice Chairman, and Executive Assistants assist the President in the performance of his duties and oversee the detail work of the President and are assisted by the President's office force.

The Consulting Engineer is engaged in research work in connection with the development of the natural resource of the states traversed by the railroad of the company.

The Office Engineer is in charge of the preparation of all maps and keeping of all engineering data.

The Architect prepares the plans and specifications for all buildings, carriers, and noncarrier.

The Valuation Engineers and their office forces keep the records required by the Interstate Commerce Commission under Section 19a of the Act to Regulate Commerce.

Group 2 is made up of officers and employees having to do with Finances, Custody and Administration of Securities or Funds.

The Treasurer and the Assistant Treasurer have the care and custody of the funds and investment securities of the company. They receive monies from all receiving agencies and make payments upon duly audited and authorized documents, rendering daily reports of their activities to the Comptroller.

Group 3 is made up of officers and employees having to do with Corporate Proceedings or Records.

The Secretary and Assistant Secretaries keep the minutes of all meetings of the Board of Directors, the Executive Committee, and the Stockholders, have custody of the seal of the company, and sign certificates of stock, contracts, and other agreements. They have custody of all contracts and leases of all property other than for parcels of right-of-way and land-grant lands. One Assistant Secretary has charge of all fire-insurance matters.

Group 4 is made up of officers and employes having to do with Real Estate, Taxes, and Titles.

The Right of Way Commissioners, assisted by their office forces, by all right-of-way, sell or lease all surplus property originally acquired for right-of-way purposes, and are the custodians of all deeds to and leases of right-of-way lands.

The Tax Commissioner, his assistants, and office force have supervision of all ad valorem tax assessments made by the taxing bodies in the states traversed by the lines of the carrier.

The Land Commissioner, Western Land Agent, Eastern Land Agent, General Adjustment Agent, Chief Geologist, Manager Iron Ore Properties, and their assistants and office and field forces are engaged in the acquisition and disposition of the land-grant lands of the carrier acquired from the United States under the Act of Congress approved July 2, 1864, and Acts amendatory thereto, and from the State of Minnesota by the carrier and its predecessors under various acts of the State Legislature.

Group 5 is made up of officers and employes having to do with Experimentation and Research.

The Engineer of Tests, his assistants, and office force test all major items of material purchases, inspect at the source manufactured material, new equipment, and rolling stock; also conduct experiments to determine the wearing qualities of various materials under varying conditions of use.

Group 6 is made up of officers and employees having to do with Claims and Litigation.

The General Counsel has general charge of all of the legal business of the carrier and is assisted by other attorneys and their office forces. He also has supervision of the General Claim, Freight Claim, and Tax Departments.

The General Claim Agent, his assistants and office force, handle all claims for injuries to persons and damage to property other than freight in transit.

The Freight Claim Agent, his assistants and office force, handle all claims for loss or damage to freight in transit.

Group 7 is made up of officers and employees having to do with Accounting.

The Comptroller has direct charge of the general books and accounts of the carrier. It is the duty of the Comptroller, his assistants, and their office forces to see that proper returns are made of receipts from all sources and that disbursements of funds are made only upon correct and proper vouchers; to make reports to the Interstate Commerce Commission, the several State commissions, and other regulatory bodies as required by law or regulation and to prepare data for the use of the President and other officers of the carrier for managerial purposes.

Group 8 is made up of officers and employees having to do with Advertisement, Industrial Development, and Traffic Solicitation.

The General Traffic Manager has general supervision over the Freight and Passenger Traffic Departments. The Freight Traffic Manager is directly in charge of all matters pertaining to freight-traffic solicitation and the making of rates and divisions. Similar work in connection with passenger traffic is in direct charge of the Passenger Traffic Manager. Both of these officials have assistants and office forces who handle the details of the work. The Director of Agricultural Development is in charge of research work in connection with the finding of new agricultural products suitable for production on lands in states served by the carrier and the improvement in crop production of existing commodities; also handles all matters pertaining to prospective development of farm lands and local industries. The first 34 officers listed, beginning with General Traffic Manager and ending with Asst. General Passenger Agents, in addition to their other work, have supervision over and

are engaged in traffic solicitation. Some 154 other agents and employees are also engaged in traffic solicitation, and these additional 154 employees are starred on the detailed statement hereto attached.

Group 9 is made up of officers and employees having to do with Management of Buildings and Lands not used in Transportation.

The only employees coming wholly within the scope of this group are those employed under the Superintendent of the General Office Building, St. Paul. These persons are all engaged in operating and maintaining the general office building, its machinery, and appurtenances. The outside properties are all under the supervision of the Right of Way Agents or the Land Commissioner, whose duties are described under Group 4.

Group 12 is made up of officers and employees having to do with Reconstruction or Major Repairs to Equipment Withdrawn from Service.

This group covers the employees in four shops in which the work is exclusively repairing or rebuilding locomotives or cars withdrawn from service and the manufacture of material for use at all points on the railroad. These employees make no repairs on equipment that is actually in service.

Group 13 is made up of officers and employees having to do with Storehouse, Reclamation, and Preserving Plants.

The Superintendent of Timber Preservation who reports to the Chief Engineer is in direct charge of the treating plants which treat ties, timber, and piling for use in maintenance and construction work. The Store Department is under the supervision of the Purchasing Agent with the General Storekeeper in direct charge. These officials, their assistants and office forces are shown in Group 14, but their labor forces are in this group. The duties of the employees shown in this group are to receive, store, and issue or ship materials and supplies of all kinds, except fuel. They also handle all scrap and useable material removed from property withdrawn from transportation service.

Group 14 is made up of officers and employees having to do with Stores and Purchases.

The Purchasing Agent, the General Storekeeper, their assistants, and their office forces, buy and supervise the receipt, storing, and issuing of all materials and supplies for the maintenance and operation of all property whether used in transportation service or not.

Group 15 is made up of an officer and employees having to do with Water Service and the Operation of Stationary Power Equipment.

The Engineer of Water Service conducts tests as to the quality of water used at all points for all purposes and plans and constructs treating plants at points where test shows plants are required. The equipment operators and helpers operate the pumping and water-treating plants. The stationary engineers and firemen operate the power plants at shops, roundhouses, and stations.

(Signed) F. C. SHAROOD.

Subscribed and sworn to before me this 13th day of September 1934.

[SEAL] G. T. C. PETERSON,
Notary Public, Ramsey County, Minn.

My commission expires October 21, 1935.

Northern Pacific Railway Company

[Detail of statement showing number of employees receiving pay during month of May 1934, not engaged in interstate commerce or in work so closely related thereto as to be a part thereof]

(1) Executive and General Officers:		
President	1	
Vice President	2	
Vice President and Special Counsel	1	
Vice Chairman	1	
Executive Assistants	3	
Assistant to President	1	
President's office force:		
Secretary to President	1	
Secretary to Vice President	1	
Chief Clerk	1	
Chief Pass Bureau	1	
Asst. Chief Clerk	1	
Stenographer	4	
Clerk	5	
Junior Clerk	1	
Chef	1	
Total		25
Consulting Engineer	1	
Rodman	1	
Total		2
Office Engineer	1	
Stenographer	1	
Total		2
Architect	1	
Draftsman	4	
Stenographer	1	
Total		6
Valuation Engineer, Mechanical Branch	1	
Valuation Inspector	3	
Stenographer	1	
Total		5
Valuation Engineer	1	
Asst. Valuation Engineer	1	
Chief Clerk	2	
Division Engineer	1	
Assistant Engineer	2	
Office Inventory Engineer	4	
Engineer Computer	5	
Draftsman, Class 1	1	
Draftsman, Class 3	1	
Stenographer	1	
Typist	3	
Clerk Computer	6	
Clerk	2	
Total		30
Grand total—Executive and General Officers		70

(2) *Finances Custody and Administration of Securities or Funds:*		
Treasurer	1	
Assistant Treasurer	1	
Paymaster	1	
Assistant Paymaster	1	
Assistant Cashier	2	
Personal Stenographer	1	
Stenographer Clerk	1	
Typist	1	
Typist Clerk	1	
Bookkeeper	1	
Assistant Bookkeeper	1	
Clerk	5	
Voucher Clerk	1	
Messenger	1	
Total		20
(3) *Corporate Proceedings or Records:*		
Secretary & Asst. Treasurer	1	
Asst. Secretary and Asst. Treasurer	1	
Assistant Secretary	2	
Custodian	1	
Stenographer Clerk	1	
Typist Clerk	1	
General Assistant	1	
Stenographer	2	
Clerk	1	
File Clerk	1	
Office Boy	1	
Fire Prevention Inspector	1	
Total		14
(4) *Real Estate Taxes and Titles:*		
Right of Way Commissioner	2	
Tax Commissioner	1	
Asst. Tax Commissioner	1	
Land Commissioner	1	
Asst. to Land Commissioner	1	
Western Land Agent	1	
Eastern Land Agent	1	
General Adjustment Agent	1	
Chief Geologist	1	
Asst. Chief Geologist	1	
Manager Iron Ore Properties	1	
Total		12
Right of Way Com'r—office force:		
Eastern Right of Way Agent	1	
Right of Way Agent	1	
Chief Clerk	2	
Chief Lease Clerk	1	
Draftsman	7	
Clerical Specialist	1	
Stenographer	6	
Clerk	3	
Custodian	1	
Total		23
Tax Commissioner, office force:		
Tax Agent	2	
Asst. Tax Agent	1	
Chief Clerk	1	
Stenographer	1	
Stenographer-Clerk	1	
Total		6

(4) *Real Estate Taxes and Titles*—Continued.

Asst. Tax Commissioner, office force:		
Tax Agent	1	
Chief Clerk	1	
Stenographer	1	
Clerk	1	
Total		4
Land Commissioner, office force:		
Asst. Chief Clerk	1	
Stenographer	1	
Stenographer-Clerk	1	
Draftsman	1	
Voucher Clerk	1	
Engineer	1	
Total		6
Western Land Agent, office force:		
Chief Clerk	1	
Cashier	1	
Draftsman	1	
Stenographer	1	
Office Boy	1	
Total		6
Eastern Land Agent, office force:		
Chief Clerk	1	
General Sales Agent	1	
Traveling Tax Agent	1	
Head Bookkeeper	1	
Bookkeeper	1	
Deed Clerk	1	
Clerk	2	
Stenographer	3	
Total		11
General Adjustment Agent, office force:		
Chief Clerk	1	
Adjustment Clerk & Land Examiner	1	
Contract & Selection Clerk	1	
Stenographer	1	
Total		4
Manager Iron Ore Properties, office force:		
Chief Clerk	1	
Stenographer	1	
Total		2
Land Commissioner's Field Force:		
Chief Timber Inspector	1	
Chief Land Examiner	3	
District Land Examiner	4	
Land Examiner	1	
Asst. Land Examiner	1	
Traveling Land Agent	1	
District Sales Agent	1	
Assistant Geologist	2	
Mining Engineer	1	
Fire Warden	1	
Instrumentman	1	
Cruiser—Class 1	3	
Cruiser—Class 2	2	
Cruiser—Class 3	1	
Computer—Class 1	2	
Stenographer	3	
Total		28
Grand total—Real Estate Taxes and Titles		102

(5) *Experimentation and Research:*		
Engineer of Tests	1	
Office Force:		
Chief Chemist	1	
Asst. Chemist	1	
Junior Chemist	1	
Phys. Laboratory Assistant	1	
District Material Inspector	3	
Material Inspector	5	
Machine Inspector	1	
Boiler Inspector	1	
Chief Locomotive Inspector	1	
Chief Clerk	1	
Stenographer	1	
Clerk & Messenger	1	
Total Experimentation & Research		19
(6) *Claims and Litigation:*		
General Counsel	1	
Asst. General Counsel	2	
Asst. to General Counsel	1	
General Attorney	2	
Western Counsel	1	
Asst. Western Counsel	2	
General Land Attorney	1	
Division Counsel	7	
Local Counsel	2	
Attorney	1	
General Claim Agent	1	
Freight Claim Agent	1	
Total		22
General Counsel—office force:		
Attorney	1	
Asst. Division Counsel	1	
Chief Clerk	1	
Asst. Chief Clerk	1	
Secretary to General Counsel	1	
Stenographer	5	
Clerk	2	
Total		12
General Claim Agent—office force:		
Asst. to General Claim Agent	1	
District Claim Agent	16	
Asst. District Claim Agent	1	
Chief Clerk	1	
Asst. Ch. Clerk & Secretary to General Claim Agent	1	
Stenographer	2	
Clerk	2	
Total		24
Freight Claim Agent, office force:		
Asst. Freight Claim Agent	3	
Freight Supervisor	6	
Perishable Fruit Inspector	1	
Reviser	2	
Over Short & Damage Clerk	3	
Diversion Clerk	1	
Correspondence Clerk	1	
Investigator	13	
Statistician	1	
Record Clerk	1	
Index Clerk	1	
Entry Clerk	1	
File Clerk	3	
Stenographer	8	
Total		45

(6) *Claims and Litigation*—Continued.

Asst. Freight Claim Agent, office force:		
Asst. Freight Claim Agent	1	
Chief Clerk	1	
Reviser	1	
Investigator	2	
Division Clerk	1	
Asst. Division Clerk	1	
Stenographer	3	
Total		10
Grand total, Claims and Litigation		113

(7) *Accounting Department:*

Comptroller	1	
General Auditor	1	
Asst. General Auditor	3	
Auditor Disbursements	1	
Asst. Auditor Disbursements	2	
Auditor Freight	1	
Auditor Passenger	1	
Auditor Agencies	1	
Auditor Freight Overcharge Claims	1	
General Accountant	1	
Statistician	1	
Asst. Statistician	1	
District Accountants	3	
Total		18
General Auditor, office force:		
Chief Clerk	1	
Special Accountants	13	
Traveling Special Accountants	1	
General Bookkeeper	1	
Asst. General Bookkeeper	2	
Bookkeeper	1	
Stenographer	5	
Coupon Clerk	1	
Coupon Sorter	1	
Messenger	1	
Total		27
Asst. General Auditor—office force:		
Asst. Statistician	1	
Chief Clerk	2	
Traveling Accountant	2	
Chief Compensation Clerk	1	
Compensation Clerk	1	
Clerks	3	
Stenographer	1	
Typist	1	
Clerk—Comptometer	1	
File Clerk	1	
Total		14
Auditor Disbursements—office force:		
Accountant	1	
Personal Stenographer	1	
Voucher Preparation Bureau Chief	1	
Clerks	4	
Clerk—Operator	1	
Voucher Registration Bureau Chief	1	
Asst. Registration Bureau Chief	1	
Burroughs Machine Operator	1	
Clerk—Operator	1	

(7) *Accounting Department*—Continued.

Auditor Disbursements—office force—Continued.

Clerk	3
Fuel & Stationery Bureau and Machine Section Chief	1
Asst. Chief	1
Stenographer	6
Clerk	1
Comptometer Operator	4
Comptometer—Clerk	2
Statistics Bureau Chief	1
Asst. Chief	1
Clerk	1
Bill Bureau Miscel. Chief	1
Asst. Chief	1
Clerk	5
Moon-Hopkins Machine Operator	1
Bill Bureau Joint Facility Chief	1
Asst. Chief	1
Clerk	5
A. F. E. Bureau Chief	1
Asst. Chief	1
Chief Equipment Renewal	1
Asst. Equipment Renewal	1
Clerk	2
Pay Roll Bureau Chief	1
Asst. Chief	1
Clerk	5
Messenger	1
Traveling Auditor Disbursements	5
Traveling Jt. Facility Accountant	7
Pool Accountant	1
Traveling Audr. Capital Expenditrs	1
Traveling Audr. Ry. Assn. Acctnt	1
File Clerk	1
Vault Clerk	1
Total	79

Auditor Freight Receipts—office force:

Chief Clerk	1
Asst. Chief Clerk	1
General Typist	1
Stenographer	2
Stenographer & Machine Operator	1
Office Boy	1
Received Revising	18
Transit	3
Forwarded Revising	13
Recheck	5
Local	8
Statistics	17
Forwarded Check & Balance	4
Government Accounts	4
Interline Received	25
Interline Typing	8
Tracing	6
Way Bill Sorters	14
Total	132

Auditor Passenger Receipts, office force:

Chief Clerk	1
Asst. Chief Clerk	1
Asst. Local Bureau	1
Clerk	5
Calculating Machine Operator Clerk	3
Bookkeeping	1
Chief Typist Bureau	1

(7) *Accounting Department*—Continued.

Auditor Passenger Receipts, office force—Continued.		
Stenographer & Typist	2	
Chief Home Interline Bureau	1	
Asst. Ch. Home Interline Bureau	1	
Clerk Home Interline Bureau	9	
Calculating Machine Operator	1	
Chief Govt. Accounts Bureau	1	
Chief Foreign Interline Bureau	1	
Asst. Foreign Interline Bureau	1	
Clerk Foreign Interline Bureau	5	
Ch. Conductors Account Bureau	1	
Clerk Conductors Account Bureau	6	
List & Post Machine Operator	1	
Pass Sorter	1	
Ticket Checker	4	
Stenographer	1	
Office Boy	1	
Total		50
Auditor Agencies, office force:		
Chief Clerk	1	
Asst. Chief Clerk	1	
Balance Sheet Clerk	5	
Miscellaneous Account Clerk	1	
General Clerk	1	
Remittance Clerk	1	
Demurrage Clerk	1	
Bill Clerk	1	
Switching Clerk	1	
Stenographer	2	
Adding Machine Operator	1	
Office Boy	1	
Traveling Auditor	11	
Total		28
Auditor Freight Overcharge Claims, office force:		
Chief Clerk	1	
Stenographer	1	
Claim Bureau Chief	1	
Claim Invoice	11	
Claim Reviser	3	
Clerk & Operator	2	
Rate Bureau Chief	1	
Rate Clerk	3	
Ch. Statistic & Bookkeeping Bureau	1	
Clerk	3	
Clerk and Timekeeper	1	
Stenographer Typist	2	
Office Boy	1	
Total		31
District Accountant—East—office force:		
Asst. District Accountant	1	
Chief Clerk	1	
Stenographer	1	
Chief Timekeeper	1	
Asst. Chief Timekeeper	1	
Timekeeper	11	
Asst. Timekeeper	2	
Leading Material Clerk	1	
Asst. Leading Material Clerk	2	
Material Clerk	12	
Chief Bill & Voucher Clerk	1	
Asst. Chief Bill & Voucher Clerk	1	

(7) *Accounting Department*—Continued.

District Accountant—East—office force—Continued.		
Bill & Voucher Clerk	8	
Leading A. F. E. Clerk	1	
A. F. E. Clerk	2	
Leading Distribution Clerk	1	
Distribution Clerk	10	
Chief Machine Operator	1	
Stenographer	3	
Typist	1	
Machine Operator	7	
Comptometer Operator	7	
Messenger	2	
Total		78
District Account—Central—office force:		
Asst. District Accountant	1	
Chief Clerk	1	
Chief Bill Clerk	1	
Stenographer	3	
Chief Timekeeper	1	
Timekeeper	8	
Leading Material Clerk	1	
Material Clerk	5	
Chief Bill & Voucher Clerk	1	
Bill & Voucher Clerk	4	
Leading A. F. E. Clerk	1	
A. F. E. Clerk	2	
Leading Distribution Clerk	1	
Distribution Clerk	8	
Chief Machine Operator	1	
Machine Operator	7	
Comptometer Operator	3	
Machine Operator—Typist	1	
Total		50
District Accountant—West—office force:		
Asst. District Accountant	1	
Chief Clerk	1	
Stenographer	1	
Chief Timekeeper	1	
Timekeeper	12	
Leading Material Clerk	1	
Material Clerk	12	
Chief Bill & Voucher Clerk	1	
Bill & Voucher Clerk	8	
Leading A. F. E. Clerk	1	
A. F. E. Clerk	3	
Leading Distribution Clerk	1	
Distribution Clerk	10	
Chief Machine Operator	1	
Machine Operator	5	
Comptometer	11	
Stenographer-Typist	4	
Messenger	2	
Total		76
Dining Car Division Account and Office Force:		
Division Accountant	1	
Asst. Division Accountant	1	
Clerk	8	
Machine Operator	1	
Stenographer	1	
Total		12

(7) *Accounting Department*—Continued.

Telegraph Division Accountant and Office Force:		
Division Accountant	1	
Asst. Division Accountant	1	
General Clerk	1	
Distribution Clerk	1	
Western Union Revenue Clerk	1	
Western Union & A. F. E. Clerk	1	
Joint Facility Clerk	1	
Stenographer	1	
Comptometer Operator	1	
Machine Operator	1	
Total		10
Grand total—Accounting Department		905

(8) *Advertisement, Industrial Development, and Traffic Solicitation:*

General Traffic Manager	1	
Asst. to General Traffic Manager	1	
Freight Traffic Manager	1	
Assistant to Frt. Traffic Manager	1	
General Freight Agents	5	
Western Traffic Manager	1	
Asst. General Freight Agents	2	
Foreign Freight Agent	1	
Immigration Agent	1	
Asst. General Freight Agents	2	
General Perishable Freight Agents	1	
Livestock Agent	1	
Passenger Traffic Manager	1	
General Passenger Agents	2	
Asst. General Passenger Agents	2	
Director Department Agricultural Development	1	
Traffic Representative	1	
Asst. General Freight Agents	4	
Eastern Freight Traffic Manager	1	
Asst. Freight Traffic Manager	1	
General Agents	2	
Asst. General Passenger Agents	1	
Agricultural Development Agents	3	
Total		37
General Traffic Manager—office force:		
Chief Clerk	1	
Clerks	2	
Secretary to Gen. Traffic Manager	1	
Stenographer-Clerk	1	
Junior Clerk	1	
Chef	1	
Total		7
General Freight Agent—office force:		
* General Agent	1	
* City Freight Agent	1	
* Traveling Freight Agent	2	
Chief Clerk	4	
Chief Revising Clerk	1	
Chief Tariff Clerk	1	
Clerks	21	
Statistical Clerk	1	
Office Boy	1	
Stenographer	16	
Clerk-Stenographer	1	
Total		50

(8) *Advertisement, Industrial Development, etc.*—Continued.

General Passenger Agent—office force:		
Chief Clerk	3	
Advertising Agent	1	
Special Clerk	2	
* Soliciting Passenger Agent	2	
* Traveling Passenger Agent	2	
Clerk	10	
* Chinese Agent	1	
Secretary	3	
Stenographer	7	
Total		31
Western Traffic Manager's Pay Roll:		
* General Agents	8	
Chief Clerk	12	
Janitors	2	
Stenographer	21	
* City Freight Agent	12	
* Traveling Freight Agent	6	
Special Clerk	2	
Rate Clerk	5	
Tracing Clerk	3	
* City Passenger & Ticket Agent	2	
Cashier	1	
* City Passenger Agent	7	
* Traveling Passenger Agent	7	
Stenographer-Clerk	2	
* City Ticket Agent	1	
Clerk	4	
Ticket Clerk	2	
* General Agent Passenger Dept	2	
* Passenger Agent	2	
* Chinese Passenger Agent	1	
Mail Clerk	1	
Office Boy	2	
Tariff Clerk	2	
Statistical Clerk	1	
File Clerk	1	
Secretary to City Freight Agent	1	
Secretary to Asst. Gen. Frt. Agent	1	
* Passenger Representative	1	
* Export and Import Agent	1	
* Gen. Agt.—Freight Department	1	
Cashier	1	
* District Frt. & Passgr. Agent	3	
* Traffic Agent	1	
Total		119
Agricultural Development Department—office force:		
Assistant Director	1	
Live Stock Department Agent	1	
Chief Clerk	1	
Assistant Chief Clerk	1	
Clerks	3	
Stenographer-Clerk	1	
Secretary	1	
Stenographer	2	
Immigration Agent	2	
Total		13
City Ticket Office, St. Paul—office force:		
* General Agent	1	
* City Ticket Agent	1	
Clerk	1	
* Soliciting Passenger Agent	1	
Total		4

(8) *Advertisement, Industrial Development, etc.*—Continued.

City Ticket Office, Mpls.—office force:		
• General Agent	1	
• City Passenger Agent	1	
Clerks	3	
Stenographer	1	
Total		6
Traffic Department on Line Agencies Pay Roll:		
• District Freight & Passenger Agent	1	
• City Freight Agent	6	
Chief Clerk	6	
Stenographer	6	
Stenographer-Clerk	2	
• Traveling Freight Agent	7	
• General Agent	2	
• City Freight & Passenger Agent	3	
Rate Clerk	1	
• City Passenger Agent	1	
• City Ticket Agent	1	
Clerks	3	
• Traveling Passenger Agent	1	
• City Passenger & Ticket Agent	1	
• Traveling Freight & Passgr. Agent	1	
Total		42
Traffic Department Off Line Agencies Pay Roll:		
• General Agent—Freight Dept	4	
Chief Clerk	10	
• District Passenger Agent	4	
• Traveling Passenger Agent	12	
• Commercial Agent	2	
Stenographer	11	
Stenographer-Clerk	3	
• General Agent	5	
• City Passenger Agent	4	
• City Ticket Agent	1	
Clerk	3	
• City Freight Agent	5	
• Traveling Freight Agent	13	
• Express Clerk	1	
• Traveling Freight & Pass. Agt	1	
• General Agent Passenger Dept	2	
• City Freight & Passenger Agent	3	
• Chinese Agent	2	
Rate Clerk	1	
Bill of Lading Clerk	1	
• City Passenger & Ticket Agent	1	
Assistant Ticket Agent	1	
Ticket Clerk	1	
Telephone Operation	1	
Messenger	1	
Janitor	1	
• Southwestern Agent	1	
Total		96
Grand total—Advertisement, Industrial Development, and Traffic Solicitation		404

(9) *Work Relating to Management Operation, Care or Protection of Buildings, and Lands not Devoted to or Used in Connection With Transportation:*

Superintendent General Office Bldg	1	
Office Pay Roll:		
Chief Clerk	1	
Stenographer	1	
Matron	1	
Pneumatic Tube Station Operator	1	
Foreman Mechanic	1	
Building Mechanic	1	
Handyman	1	
Carpenter	2	
Chauffeur	1	
Painter Helpers	4	
Elevator Starter	1	
Elevator Operator	5	
Head Janitor	1	
Porters	5	
Night Foreman	1	
Cleaners	24	
Watchmen	3	
Office Equipment Mechanic	4	
Chief Engineer	1	
Electrician	2	
Assistant Engineer	1	
Substation Motor Attendants	3	
Total		66
Switch Board Operators		32
Grand total		98

(12) *Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service:*

Various Classes of Employees such as Blacksmiths, Boilermakers, Carmen, Machinists, Sheet-Metal Workers, etc., at Equipment Repair Shops:		
St. Paul, Minnesota (Como)	417	
Brainerd, Minnesota	556	
Livingston, Montana	233	
So. Tacoma, Washington	555	
Total		1,761

(13) *Foremen and Laborers in Stores, Reclamation, and Timber Plants:*

General Superintendent Timber Preserving Plants	1	
Asst. General Superintendent	1	
Chief Clerk	1	
Distribution Clerk	1	
Yard Clerk	2	
Watchman	3	
Motorman	1	
Laborer	12	
Tie Handler	41	
Total		63
Chauffeur	17	
Blacksmith	1	
Electrical Worker	2	
Laborer (Store)	283	
Cook (Supply Train)	4	
Gang Foreman	34	
Total		341
Grand total—Foremen and Laborers in Stores, Reclamation, and Timber Plants		404

(14) *Storekeepers, Sales Agents, and Buyers:*

Purchasing Agent	1	
Asst. Purchasing Agent	3	
General Storekeeper	1	
Asst. General Storekeeper	2	
Timber Agent	1	
Total		8
Purchasing Agent—office force:		
Chief Clerk	3	
Clerk	7	
Stenographer	6	
Messenger	2	
Chief Fuel Inspector	2	
Foreman Timber Inspector	2	
Timber Inspector	8	
Total		29
Purchasing Agent West—office force:		
Chief Clerk	1	
Order Clerk	1	
Stenographer	1	
Stenographer-Clerk	1	
Chief Lumber Inspector	1	
Lumber Inspector	6	
Total		11
General Storekeeper—office force:		
Chief Clerk	1	
Secretary	1	
Stenographer	1	
Clerk	5	
Typist-Clerk	2	
Coupon Poster	1	
Messenger	1	
Total		11
Division Storekeeper	7	
District Storekeeper	4	
Storekeeper	6	
Supply Train Storekeeper	2	
Local Storekeeper	11	
Stationery Storekeeper	1	
Stationer	1	
Traveling Storekeeper	1	
Total		33
Division Storekeeper's office force:		
Chief Clerk	8	
Clerk	16	
Stenographer	15	
Total		39
Stationery Store:		
Clerk	1	
Section Stockman	1	
Store Helpers	3	
Total		5
Grand Total—Storekeepers, Sales Agents, and Buyers		136

(15) *Pumping Equipment, Operators, Stationary Engineers and Firemen, Oilers, Coal Passers, and Water Tenders:*

Engineer Water Service	1
Portable Steam Equipment Operators	53
Portable Steam Equipment Operators' Helpers	15
Pumping Equipment Operator	34
Stationary Engineers	41
Stationary Firemen	78
Total	222

Plaintiffs' Exhibit 9

AFFIDAVIT

Filed Oct. 17, 1934

STATE OF NEW YORK,
County of New York, ss:

ROBERT B. FERGUSON, being duly sworn, deposes and says:

I am Comptroller of The Delaware, Lackawanna and Western Railroad Company, one of the plaintiffs in the above-entitled action, reside at Springfield, New Jersey, and have my office at No. 140 Cedar Street, Borough of Manhattan, City, County, and State of New York.

I entered the service of said Railroad Company as General Accountant in the year 1900, and have been continuously employed by it from that time to the present, successively as Auditor of Miscellaneous Accounts, Auditor of Disbursements, General Auditor, and Comptroller, to which latter position I was appointed on October 1, 1930.

In the course of my services in these various capacities, and particularly as General Auditor and Comptroller, I have been in close touch with all the departments of the Railroad Company, and have acquired knowledge of the personnel of such departments and the duties performed by the officers and employees therein.

I have prepared a report showing the number of employees of The Delaware, Lackawanna and Western Railroad Company receiving pay during the month of May 1934 who were not engaged in interstate commerce or in work so closely related thereto as to be a part thereof. Such report is attached to an affidavit made by me in the above-entitled action and sworn to on September 11, 1934.

In this affidavit and report the officers and employees of the Railroad Company not engaged in interstate commerce are classified and included in sixteen groups or classes according to the nature of their duties and the work performed by them. The officers and employees included in said report do not have any duties or perform any work of operation or transportation on said railroad.

The nature of the respective duties of these officers and employees and the work performed by them is set forth in more detail, as follows:

1. Executive and General Officers.—This class contains the following officers of the company, namely: President, Vice President and General Counsel, Vice President in Charge of Traffic, Chief Engineer, Consulting Electrical Engineer, Valuation Engineer, Assistant

to Chief Engineer, Superintendent of Motive Power and Equipment, Mechanical Engineer, Architect, two Division Engineers, Superintendent of Shops, Secretary and Treasurer, Assistant Secretary and Assistant Treasurer.

The titles of these officers indicate the character of their duties.

The President is a member of the Board of Managers and of the Executive Committee of the Company and has general charge of all the business and affairs of the Company.

The Vice President and General Counsel is in charge of the Legal Department of the Company and has general direction and supervision of its litigation and other legal matters.

The Vice President in Charge of Traffic is the head of the Traffic Department of the Company and has direction and supervision over traffic matters, including the solicitation of traffic, establishment of routes and of rates, fares, and divisions thereof.

The Chief Engineer is the head of the Engineering Department of the Company and has as assistants the Consulting Electrical Engineer, Valuation Engineer, Assistant to Chief Engineer, two Division Engineers, and an Architect, the duties of all of whom are indicated by their respective titles and are of an executive or supervisory nature.

The duties of the Valuation Engineer are confined solely to the making and keeping up to date of the valuation of the properties of the Company as required by the Interstate Commerce Act.

The Superintendent of Motive Power and Equipment, Mechanical Engineer, and the Superintendent of Shops are general officers of the Motive Power and Equipment Department, and their duties are of an executive or supervisory character.

The Secretary and Treasurer, Assistant Secretary, and Assistant Treasurer are executive officers in charge of the financial affairs of the Railroad Company.

None of these officers or employees is engaged in the performance of the work of transportation or operation. The Vice President in Charge of Operation and the officers and employees, including the General Superintendent and Division Superintendents, who are engaged in operation or transportation, have not been included.

2. Finance, Custody, and Administration of Securities or Funds.—This class includes the employees of the Treasury Department (other than the Treasurer, Assistant Secretary, and Assistant Treasurer included in Class No. 1), the Paymaster, and his employees.

The employees of the Treasury Department and the Paymaster's Department consist of a Cashier, an Assistant Cashier, a Transfer Agent, whose duties are confined solely to making transfers of stocks and bonds of the Company, and clerical and stenographic forces. Their duties relate wholly to the financial affairs of the Railroad Company, the receipt and disbursement of funds, and the issuance, custody, and transfer of stocks and bonds.

3. Corporate Proceedings and Records.—No employees are included in this class.

4. Real Estate, Taxes, and Titles.—In this class are the officers and employees of the Real Estate and Tax Department of the Company. They have charge of the Company's real estate and of all matters pertaining to real-estate taxes. They handle the purchase,

sale, and lease of real estate, prepare necessary contracts, deeds, and leases in connection therewith, and are custodians of the title records of the Company.

5. Experimentation and Research.—This class includes six employees, consisting of a Chief Chemist and five technical and clerical assistants, who are engaged solely in experimentation work and testing of materials used in the Company's business.

6. Claims and Litigation.—There are 75 officers and employees included in this class. They consist of lawyers in the Legal Department (other than the Vice President and General Counsel included in Class No. 1), and clerks and stenographers in the Legal Department; the Manager of the Personal Injury Claims Department and his assistants, including claim agents and office clerical forces; and the Freight Claim Agent in charge of freight claims and his assistant claim agents and office clerical force. The officers and employees included in this class are full-time employees on regular salaries. Local or special counsel who are not employed on a full-time basis have not been included.

The lawyers and their clerical or stenographic assistants in the Legal Department are engaged in the handling of litigation, giving advice on legal questions, preparation of agreements, and other similar legal work.

The Manager of the Claims Department and his assistants and clerical forces are engaged in the performance of duties relating exclusively to the investigation and settlement of claims against the Company arising out of personal injuries or death or damage to property.

The Freight Claim Agent and his assistants and clerical force are engaged in the performance of duties relating exclusively to the investigation and settlement of claims arising out of the transportation of freight.

7. Accounting.—In this class are included the Comptroller, all subordinate officers, traveling auditors, and clerical forces in the Accounting Department of the Railroad Company. The duties of these officers and employees are of an accounting character exclusively. They are all employed in the general accounting office of the Company in New York City or in the office of the Auditor of Freight and Passenger Revenue in Scranton, Pa., and their work is the auditing and recording of the company's accounts, the making of such reports as are required by law, the preparation of statistical data, the preparation of income-tax reports, and other work of a similar character. Employees engaged in the making of documents or records directly connected with transportation, such as bills of lading, waybills, and delivery receipts, and employees engaged in checking freight in yards or stations have not been included.

8. Advertising, industrial development, and traffic solicitation.—This class includes 301 officers and employees in the Traffic Department of the Railroad Company (other than the Vice President in Charge of Traffic included in Class No. 1). They are engaged in advertising work, in securing the location of industries along the line of the Railroad Company, the solicitation of traffic, making rates, fares, and divisions thereof, filing tariffs, and other work of this general character.

9. Management, Operation, Care, or Protection of Buildings or Lands not Devoted to or Used in Connection with Transportation.—No officers or employees are reported in this class.

10. Work Relating to the Construction of Buildings and Lines of Railway.—This class includes 30 engineers and employees engaged in new construction, consisting of the building of an overhead highway bridge at East Bethany, N. Y., and the construction of a new fire-alarm system at Hoboken, N. J.

11. Work Relating to the Construction of New Equipment.—No officers or employees are reported in this class.

12. Work Relating to Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service.—In this class are included 1,208 officers and employees (other than the general officers included in Class No. 1), who work in the Company's back shops in which is performed the work of reconstruction or major repair of equipment, which has been withdrawn from transportation service for that purpose. Officers and employees in roundhouses or other places where temporary or running repairs to equipment are made have not been included.

13. Foremen and Laborers in Stores, Reclamation and Timber Treating Plants.—The duties of the 170 officers and employees included in this class consist of the handling of materials and supplies in the Company's stores, and the handling and treatment of materials at the Company's reclamation and treating plants before such materials are put into actual use.

14. Storekeepers, Sales Agents, and Buyers.—In this class are 32 officers and employees, consisting of the Purchasing Agent, Assistant Purchasing Agent, General Storekeeper, and their assistants, who are engaged in the purchase and storing of materials and supplies, and the distribution thereof to the various departments of the Company as needed.

15. Pumping Equipment Operators, Stationary Engineers and Firemen, Oilers, Coal Passers, and Water Tenders.—139 employees are included in this class. They consist of employees engaged in the operation of pumping equipment at water stations, the operation of stationary engines, the delivery of coal into storage bins, and the pumping of water into storage tanks. No employee is included whose duty it is to transfer or deliver coal from storage bins or water from storage tanks to locomotives.

16. All Other Employees Not Engaged in Interstate Commerce Not Included in the Preceding Classes.—This class includes 10 professional or subprofessional assistants and 143 chief clerks, clerks, and stenographers employed in the general offices of the Motive Power and Equipment Department in connection with the general work of that department; 43 professional or subprofessional assistants and 59 chief clerks, clerks, and stenographers employed in the general offices of the Engineering Department; 14 chief clerks, clerks, and stenographers employed in the general office of the Purchasing Department; 5 clerks and stenographers employed in the President's office; 15 motor-vehicle operators; 17 watchmen; 5 telephone-switchboard operators in the general offices of the Company in New York; and 4 elevator operators in the general offices of the Company at Scranton and Buffalo.

The motor-vehicle operators above referred to have nothing to do with the transportation of freight in interstate commerce. Their work consists solely of distributing stores of the Company.

The watchmen above referred to are engaged in watching and protecting the Company's buildings at various places on its railroad. They do not include the officers or men of the Company's Police Department assigned to the protection of trains or passengers or freight in the course of transportation.

I make this affidavit upon my personal knowledge, and with full knowledge that it is to be used as evidence at the trial of the above-entitled action.

R. B. FERGUSON.

Subscribed and Sworn to before me this 12th day of September 1934.

[SEAL] JOSEPH FIELL,
Notary Public, New York County, No. 73.

Commission expires March 30, 1935.

Plaintiff's Exhibit 10

AFFIDAVIT

Filed Oct. 11, 1934

STATE OF NEW YORK,
County of New York, ss:

JOHN G. WALBER, being first duly sworn, deposes and says:

That he is Vice President in charge of Personnel of The New York Central Railroad Company, one of the plaintiffs in the above entitled cause, and has continuously been such since November 1, 1922, and is familiar with the averments hereinafter set forth and makes this affidavit with knowledge that it is to be used as evidence in the said cause.

In amplification of the affidavit in the above-entitled cause, verified this day by the deponent, showing the number of employees of The New York Central Railroad Company who received pay during the month of May 1934, not engaged in interstate commerce or work so closely related thereto as to be a part thereof, the deponent sets forth the following recital of the character of work performed by, or field of activity of, those included in the several subdivisions of said affidavit, as follows:

1. Executive and General Officers.—This group includes such executive officers (their assistants and their staffs) as the President and those Vice Presidents who are not specifically included in subsequent subdivisions, all of whom are engaged in executive duties.

2. Finances, Custody, and Administration of Securities of Funds.—This group includes those in charge of corporate relations, investments, security issues, etc.; the Treasurer and his Assistants, including the forces engaged in handling transfers of bonds and stocks, cashiers, and their clerical and stenographic forces.

3. Corporate Proceedings and Records.—This group includes the Secretary, Assistant Secretaries and their staffs; also custodians and registrars of contracts and other documents of the Company.

4. Real Estate, Taxes, and Titles.—This group includes the General Land and Tax Agent and his staff, whose duties are exclusively confined to the handling of matters relating to real estate, to land titles, to taxes, and to negotiation of leases, contracts, and agreements relating to real property not used for transportation purposes.

5. Experimentation and Research.—This group includes the officials and staffs of the Vice President in charge of Improvements and Developments, and the Assistant to the President in charge of mechanical improvements. These forces are engaged in research and experimentation, including the design of motive power and car equipment, steam and electric power, testing of materials, chemical analyses, etc.

6. Claims and Litigation.—This group includes all full-time employees in the Law Department, including the Personal Injury Claim Department, the Loss and Damage Claim Department, and Surgeons.

Under the Law Department there are included the Vice President, General Counsel, General Solicitor, General Attorneys, Commerce Counsel, law clerks in the Law Department, together with their clerical, stenographic, and other assistants; the General Claims Attorney, the Assistant General Claims Attorney, District Claim Agents and Claim Agents, the General Freight Claim Agent, and other Loss and Damage Claim Agents, together with all of their clerical and stenographic assistants. This includes all members of the Law Department in the general offices. It does not include Division Counsel, Special Counsel, or Local Counsel, who are engaged in general practice and do not devote their entire time to the service of the railroad company.

Those included in this group are the full-time Attorneys of the Company engaged in handling the law work of the Company, which includes the rendition of legal advice, the making of contracts, etc., and the charge of litigation involving taxes, titles, personal injuries, loss and damage, etc. This group also includes all engaged in the investigation and settlement of claims.

7. Accounting.—This group includes the entire staff of the Accounting Department, including the Vice President, the Comptroller, Assistant Comptroller, Assistants to the Comptroller, General Auditors of Revenues and Disbursements, Auditors of Freight and Passenger Accounts, Supervisors of Station Accounts, together with their clerical, stenographic, and other assistants.

There are also included all the employees of the Office of Car Records whose duties are exclusively confined to accounting.

The duties of all of those included under this group are exclusively confined to the auditing, recording, and preserving of accounts and records, bookkeeping, the preparation of reports required by law for various regulatory bodies affecting matters of accounts and records, the compilation of statistical data, and the preparation of reports for other departments.

8. Advertising, Industrial Development and Traffic Solicitation.—There are included under this group all of those employees whose duties are exclusively confined to traffic and traffic solicitation, advertising, and the investigation and promotion of industrial development and location; such as, the Vice President in charge of Traf-

fic, the Vice President in charge of Freight Traffic, the General Passenger Traffic Manager, the Freight Traffic Manager, the Passenger Traffic Manager, General Freight Agents, the Coal Traffic Manager, General Passenger Agents, Industrial Agents, Chiefs of Tariff Bureaus, and their clerical, stenographic, and other assistants whose duties are confined to the same matters.

9. Work Relating to the Management, Operation, Care, or Protection of Buildings and Lands Not Devoted to or Used in Connection With Transportation.—Under this group the following have been considered buildings not devoted to or used in transportation; general office buildings, buildings owned by the carrier which are rented or leased to others, buildings owned by others and leased by the carrier, or buildings owned by the carrier, when not used for purposes directly connected with operation or transportation.

In this group are included the Superintendents of such buildings, Renting Supervisors, and the forces engaged in their operation, such as electricians, watchmen, switchboard operators, messengers, janitors, elevator operators, cleaners, porters, and charwomen.

There also have been included those employees whose duties and work are exclusively confined to supervision.

10. Work Relating to the Construction of Buildings and Lines of Railway.—There are included in this group Assistant Engineers and other employees of every rank who are directly employed on construction work, as distinguished from work connected with the repair or maintenance of existing operating properties. Such construction work consists of the West Side Improvements, New York City, Relocation and Grade Separation, Syracuse, N. Y., and similar operations.

11. Work Relating to Construction of New Equipment.—In this group we have included only the forces of the Assistant to the President who are directly engaged in studying the practical operations of motive power (electrical and steam) and car equipment in order to decide upon changes in types and designs.

12. Work Relating to Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service.—There are included in this group employees in the Maintenance of Equipment Department who are engaged in classified repairs to or reconstruction of equipment withdrawn from service, such as locomotives and cars, as distinguished from employees engaged in temporary or running repairs to equipment which has not been withdrawn from service. In this group the number shown is substantially less than the number so engaged during periods of greater business activity. During the month of May 1934 work falling in this subdivision was conducted on a minimum basis, some of the larger shops of the Company being closed down during all or part of said month. Ordinarily the number in this group would be considerably larger.

13. Foremen and Laborers in Stores, Reclamation, and Timber Treating Plants.—There are included in this group the Foremen, Clerks, and Laborers in the Stores and Reclamation Departments. Their duties are exclusively confined to the handling, care, custody, and distribution of materials and supplies not yet devoted to transportation, and to the handling and reclamation of scrap or usable parts withdrawn from transportation service and not distributed for reuse in the maintenance departments.

14. Storekeepers, Sales Agents, and Buyers.—There are included in this group the Vice President of Purchases and Stores, the General Purchasing Agent, the Purchasing Agent and Assistants, General Storekeepers, General Fuel Agents, the General Tie & Timber Inspector, and Stationers, together with their clerical, stenographic, and other assistants. Their duties are exclusively confined to the purchase, inspection, selection, keeping, and issuing of materials and supplies not yet incorporated into the operating properties or devoted to transportation.

15. Pumping-Equipment Operators, Stationary Engineers and Firemen, Oilers, Coal Passers, and Water Tenders.—There are included under this group the Superintendent of Power and his assistants in charge of the generation of electric power, stationary power plants for the production of power for shops, stations, office buildings, grain elevators, etc.; pumping-equipment operators and pumpers, engaged in pumping water to storage tanks, and stationary engineers and firemen, oilers, coal passers, and water tenders. Employees whose work is in connection with the delivering of water from storage tanks to locomotives in operation, or the firing, oiling, coaling, or tending of equipment in operation and transportation service, are not included in this group.

Supplemental Matter

In addition to the foregoing numbers of employees of said Railroad Company who are not engaged in interstate commerce or work so closely related thereto as to be a part thereof, the deponent avers that the said Railroad Company employs 2,180 persons who are residents of, and whose work is performed exclusively within, the Dominion of Canada. The aggregate monthly pay roll of said persons is approximately $273,552.

(Signed) JNO. G. WALBER.

Subscribed and sworn to before me this 11th day of September 1934.

[SEAL] (Sgd.) W. J. GRETSER,
Notary Public, Bronx County.

Bronx Co. Clk's No. 114, Reg. No. 80G36. Cert. filed in N. Y. County. New York Co. Clk's No. 550, Reg. No. 6G309. Certificates filed in Westchester Co. Commission Expires March 30, 1936.

Plaintiffs' Exhibit 11

AFFIDAVIT

Filed Oct. 11, 1934

STATE OF KENTUCKY,
County of Jefferson, ss:

H. F. THOMPSON, being first duly sworn, says that he is, and has been since 1916, Assistant Comptroller of the Louisville and Nashville Railroad Company, a party plaintiff in the above-styled action, and that he has been in the employ of said Company since 1905, his entire service having been in the accounting department and in the office of the Comptroller of said Company.

He says that in the performance of his official duties he has become familiar in a general way with the character of services and the kind of duties performed by officers and employees of said Company.

He further says that he is the same H. F. Thompson who on September 10, 1934, executed an affidavit in the above-styled cause, to which was attached a report showing the number of employees of said Louisville and Nashville Railroad Company receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related thereto as to be a part thereof. Said report was prepared by or under the direction of this affiant, and in its preparation and in the determination of the employees to be included therein he was guided by his general knowledge of the duties performed by officers and employees of said Company, and also received the advice and assistance of members of said Company's law department and of officers or officials of each class of employees.

The above-mentioned affidavit and the statement thereto attached classify the employees included therein as not being engaged in interstate commerce or closely related work into sixteen (16) classes or groups. It is the purpose of this affidavit to describe in some detail the nature of the services and duties performed by such officers and employees as were so included in said affidavit and statement.

I. Executive and General Officers.—This group includes:

The Chairman of the Board, who presides at meetings of the Board, the Executive Committee and Finance Committee at New York, and has general supervision of the affairs of the Company;

The President, who has general direction of all departments of the Company's service;

The Vice President in charge of Traffic, who has direct charge of relations with competing and connecting lines, and the general management of the traffic department, including both traffic solicitation and rate adjustments;

The Vice President in charge of Legal Affairs, who has direct charge of litigation and legal business of the Company, and is in general charge of its law department;

The Vice President in charge of Finance and Accounting, who has special charge of all matters pertaining to the financial condition of the Company not devolving upon the Chairman. He is also charged with general supervision of the treasury and accounting departments;

The Treasurer, who is the custodian of the Company's funds in depositories other than in the City of New York;

The Secretary, who is custodian of the Company's records and performs such duties as are customarily involved in handling corporate affairs;

The General Purchasing Agent, who has general charge of the purchasing of all supplies and fuel, and the disposition of surplus and salvaged property;

The Director of Personnel, with general jurisdiction over matters of wage and rule agreements with employees, and questions arising thereunder, and of safety.

There is also included in this group all staff assistants and office and clerical forces of the above-named officers.

In addition, there are included certain employees of the engineering department who are engaged in the preparation of plans and estimates for the construction and reconstruction of buildings, bridges, track and track structures, water supply and distribution systems, signal systems and crossing warnings, or in fire-prevention work, the revision of valuation maps, and the maintenance of office records. This group does not include the Vice President in charge of Operation, or any officers in the operating department, among others, the General Manager, the Assistant General Manager, the Superintendent of Transportation, Division or Terminal Superintendents, their staff officers, or clerical, stenographic or office forces employed in the operation of the Company's railroad; nor were said officers or persons included in any other group in said affidavit or statement.

II. Finances, Custody and Administration of Securities or Funds.—This group includes the assistants to the Treasurer, charged with the receipt and disbursement of money, and his office and stenographic force, and also the cashiers and assistant cashiers at large stations whose sole duty is the receipt, custody, and disbursement of the Company's funds.

III. Corporate Proceedings and Corporate Records.—This group includes only the Assistant Secretary at Louisville, who assists the Secretary and also acts as Transfer Agent at Louisville, together with his immediate office force.

IV. Real Estate, Taxes and Titles.—This group includes the Real Estate Agent, who has general charge of matters relating to real estate of the Company, the custody and revision of right-of-way maps, the preparation of tax returns, and who, acting with the law department, is charged with the duty of procuring proper assessments of the Company's property. This group includes the Real Estate Agent's assistants, draftsmen, office and stenographic force.

V. Experimentation and Research.—This group includes one employee engaged in testing cement, sand, and gravel, and other employees engaged in making tests and analyses of material in the Company's laboratory at its South Louisville Shops.

VI. Claims and Litigation.—This group includes the Company's General Solicitor, General Attorney, Assistant to General Counsel, its District Attorney for Kentucky, together with their assistants, office and stenographic force, all being whole-time employees whose duties are limited to the legal affairs of the Company. (The General Counsel, being the same person as the Vice President in charge of Legal Affairs, is not included in the group, having been included in Group I.)

It also includes the General Claims Attorney, who has general charge of litigation and claims arising out of personal injuries and loss and damage to freight, the General Claim Agent and his assistants, their office and stenographic forces, claim agents, investigators in the loss and damage claims office, employees engaged in editing and publishing the Employees Monthly Magazine, and nurses employed at first-aid stations.

This group does not include claim prevention agents, of any attorneys or surgeons, who are engaged in the general practice of their

profession and not exclusively engaged in the business of the Company, or the assistants or clerical force of such attorneys or surgeons.

VII. Accounting.—This group includes the Comptroller, two Assistant Comptrollers, the Auditor Freight Accounts, the Auditor Passenger Accounts, the Auditor Station Accounts, the Auditor Overcharge Claims, the Auditor of Disbursements, and the Car Accountant, together with their clerical and stenographic staffs. The duties of all of said officers, together with their assistants and staffs, are exclusively confined to the auditing and recording of accounts and records, the preparation of reports required to be made to regulatory and taxing authorities, the preparation of statistical data, and the making and furnishing of statistical and accounting information in aid of other departments.

VIII. Advertising, Industrial Development, and Traffic Solicitation.—This group includes Division Freight Agents, who supervise solicitation and all traffic matters in the territory assigned to them, General Agents, Commercial Agents, Traveling Freight Agents, City Freight Agents, City Freight Service Agents, Traveling Freight Service Agents, and one Export and Import Agent, the duties of all of whom are in general the solicitation of freight traffic, the quotation of rates, and the rendition of information and service to shippers and prospective shippers.

This group also includes employees of the passenger department, such as Division Passenger Agents, General Agents, District Passenger Agents, Traveling Passenger Agents, City Passenger Agents, City Ticket Agents, Depot Passenger Agents, and ticket sellers in city ticket offices, the duties of this class being the solicitation of passenger traffic and the furnishing of information and services to prospective passengers.

In addition to the indicated officers and employees this group includes their office and stenographic staffs.

This group also includes employees of the Industrial and Agricultural Development Department, who give advice on farm problems, including the production of crops, both plant and animal, and the preparation of products for market, induce immigration into territories adjacent to the Company's railroad, and assist in the establishment of prospective industries along the Company's lines.

IX. Work Relating to the Management, Operation, Care, or Protection of Buildings and Lands not Devoted to or Used in Connection with Transportation.—This group includes only employees engaged in the operation, maintenance, repair, and cleaning of the Company's general office building at Louisville, together with operators of the telephone exchange located therein.

X. Work Relating to the Construction of Building and Lines of Railway.—During the month of May 1934 the Company was not engaged in the construction of any new lines of railway or buildings and had no employees engaged therein.

XI. Construction of New Equipment.—During the month of May 1934 the Company was not engaged in the construction of new equipment and had no employees engaged therein.

XII. Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service.—There are included in this group only such employees of the mechanical department as were engaged in the

reconstruction of, or making major repairs to, equipment which was completely withdrawn from transportation service, the work in which said employees were engaged being the removal of worn or defective parts, the repair thereof, or the manufacture of replacements therefor, and the reassembling of repaired, purchased, or manufactured parts into complete operating units.

XIII. Foremen and Laborers in Stores, Reclamation, and Timber-Treating Plants.—This group includes employees engaged in the handling, unloading, and distribution of stationery and office supplies from stock rooms, the operation of automobile trucks engaged in the distribution of storehouse supplies, the operation of loading equipment, and the unpacking, packing, storage, and distribution of supplies and equipment at or from storehouses, material yards, and reclamation plants.

It also includes employees engaged in the operation of the Company's timber-treating plant at Gautier, Mississippi.

XIV. Storekeepers, Sales Agents, and Buyers.—This group includes employees of the general purchasing office engaged in the purchasing, ordering, accounting for and storage of material and supplies, and the inspection of engine fuel, including the necessary clerical and office force.

It also includes employees engaged in the purchase and inspection of ties, timber, and lumber.

XV. Pumping Equipment Operators, Stationary Engineers and Firemen, Oilers, Coal Passers, and Water Tenders.—This group includes employees engaged in the operator of water supply pumping stations, boilers for the operation of machines used in construction, reconstruction, and maintenance work, and in repairing water station equipment and distribution lines.

It also includes employees engaged in the manufacture and generation of electric current and heat, and the operation and maintenance of boilers, engines, dynamos, air compressors, and pumps.

It does not include employees engaged in the delivery of water to locomotives, or engaged in firing, oiling, coaling, or tending locomotives or equipment used in transportation service.

XVI. All Other Employees Not Engaged in Interstate Commerce Not Included in the Preceding Classes.—This group includes employees in the Pass Bureau, who are exclusively engaged in the issuance of free transportation and office work incident thereto.

H. F. THOMPSON,
Assistant Comptroller,
Louisville and Nashville Railroad Company.

The undersigned, C. W. Shaft, a Notary Public in and for the State and County aforesaid, certifies that on this day appeared H. F. Thompson, known to me, and known by me to be an Assistant Comptroller of Louisville and Nashville Railroad Company, who made oath that the statements in the foregoing affidavit were true, as he verily believes.

Witness my hand and seal this 12th day of September 1934.
My commission expires May 15, 1938.

[SEAL]

C. W. SHAFT,
Notary Public, Jefferson County, Kentucky.

Plaintiffs' Exhibit 12

AFFIDAVIT OF A. L. CONRAD, ASSISTANT GENERAL AUDITOR OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Filed October 11, 1934

STATE OF ILLINOIS,
County of Cook, ss:

A. L. CONRAD, being first duly sworn, deposes and says that he is, and for twenty-four years has been, Assistant General Auditor of The Atchison, Topeka and Santa Fe Railway Company, one of the plaintiffs in the above-entitled case, and makes this affidavit for use in evidence in said case; that he has had about fifty-two years' experience in railway operation, accounting, and statistical activities, of which forty-three years have been in the employ of the above-named Company and its subsidiary companies as Traveling Auditor, Agent at large train terminals, Auditor and Traffic Manager of subsidiary lines, Auditor of Disbursements, and Assistant General Auditor; and that as Assistant General Auditor it has been his duty, among other things, to generally direct and supervise the Company's statistical and cost accounting activities, including the financial and statistical data reported to, and for use in proceedings before, federal and state commissions, and special statistics compiled for the information and guidance of the executive and general officers of said Company; that in the course of the performance of his duties in various capacities he has come into close contact with all of the various departments and is generally familiar with the duties performed by the various officers and different classes of employees for said Company; and, based on his information and knowledge so acquired, affiant further says, with respect to the work performed for said Company by classes as listed below:

1. Work performed by executives and general officers.—The work performed by the executive officers of said Company, such as its President, the Vice President, who acts as executive assistant to the President, and Vice President in charge of traffic, and their staff assistants, is, in general, to plan and determine the general policies and activities of the Company and generally to direct the execution of those policies and activities through subordinate departmental officers. General officers, in turn, execute and direct the execution of such policies and activities within their respective departments.

2. Work Relating to Finances, Custody, and Administration of Securities or Funds.—The foregoing classes of work are under the immediate jurisdiction of the Treasurer and Assistant Treasurers and the Comptroller.

The Treasurer, his assistants, and employes under his direction collect transportation charges and other moneys due the Company, pass upon credit arrangements with shippers and consignees in accordance with the order of the Interstate Commerce Commission with respect to the collection of transportation charges. They also make disbursements of interest and dividends, and pay salaries, wages, and other obligations of the Company.

The Comptroller has the supervision and custody of the bonds, stocks, and other securities owned by the Company, and of the issu-

ing, cancellation, and reissuing of stock certificates, and of the issuing of bonds by the Company.

3. Work Relating to Corporate Proceedings or Records.—This work is performed by the Secretary and Assistant Secretaries and Transfer Agent of the Company, who have custody of the deeds, leases, and other contracts of the Company, affix the corporate seal to instruments executed by the Company which require it, register its bonds, and make stock transfers. They also attend the meetings and keep minutes of the proceedings of the stockholders, Board of Directors, and Executive Committee.

4. Work Relating to Real Estate, Taxes, and Titles.—The Company has no separate real-estate department and real-estate purchases, sales, and leases ordinarily are handled by right-of-way agents or other employes who report to the General Managers.

The Commissioner of Taxes and his assistants render the properties of the Company for assessment and appear before the various state, county, and municipal taxing bodies for the purpose of procuring, as nearly as possible, fair valuations and assessments, examine the records of such taxing bodies to ascertain whether the taxes levied and assessed are lawful, and pay all lawful taxes and report to the Law Department and assist it in contesting those which are not. So-called franchise taxes, based upon the amount of capital stock alone or in combination or a proportion of capital stock, property and/or business in a particular state are under the jurisdiction of the Commissioner of Taxes. Federal taxes and state income or other taxes based upon reports or returns involving the accounts of the Company are handled by the Accounting Department.

5. Work Connected With Experimentation and Research.—This work is under the general direction of the Engineer of Tests at Topeka. Materials, supplies, and mechanical devices are there tested, and research and experimental work there carried on. The Engineer of Tests also at various times conducts tests on various parts of the railroad for the purpose of determining the efficiency and tonnage rating of locomotives.

6. Work Relating to Claims and Litigation.—The legal work of the Company is handled under the jurisdiction of the General Counsel, who is the consulting legal officer of the Company, and the General Solicitor, to whom report attorneys located at Chicago, Topeka, Los Angeles, and San Francisco, who are exclusively engaged in legal work for the Company. Other legal work is handled by attorneys in private practice who are employed for specific undertakings or who are under contract to perform such work as may be assigned to them within a given territory, and who, as affiant is advised, are not employes as defined in the Railroad Retirement Act, but are in the nature of independent contractors.

A few employes of the Company act as clerical assistants to some of these contract attorneys and the full-time attorneys are assisted in their work by clerical forces which also are Company employes and devote their time exclusively to work of the Law Department.

Freight, personal injury, fire, and miscellaneous (except live stock and overcharge) claims, are handled under the supervision of the General Claim Agent, whose main office is at Topeka, with branch offices at Los Angeles, Amarillo, and Chicago. One or more claim

adjusters are located on each Division. Their duties are to ascertain the facts by correspondence or otherwise, adjust claims, and assist the Law Department in litigation arising therefrom. Live-stock claims are handled under the jurisdiction of the live-stock department, which is a branch of the Traffic Department. Overcharge claims are handled by the Accounting Department.

7. Accounting Work.—The accounts of the Company are kept in a form prescribed by the Interstate Commerce Commission and this work is performed by the Accounting Department, which is also charged with the duty of preparing statistical and other reports made to, or for use in proceedings before, various federal and state agencies, and the making of statistical and other reports for the executives or general officers of other departments. The Accounting Department also has charge of the bonding of employes and makes periodical checks of the Company's funds and securities.

The Superintendent of Car Service and his force at Topeka perform car accounting work, which consists in general of keeping record of cars of the Company on its own and foreign lines and of foreign lines' cars on the Company's lines, and making up periodical statements showing amounts payable to or by the Company for per diem or mileage charges in accordance with inter-line arrangements made for the use of cars of one company by another.

8. Advertisement, Industrial Development, and Traffic Solicitation Work.—Advertising in Chicago and off-line publications is carried on under the supervision of the General Advertising Manager and his staff, who also prepare the advertising matter contained in and publish time tables, together with booklets describing matters of attraction and interest to persons using, or who might use, the Santa Fe. Local or on-line newspaper advertising (except at Chicago) is handled by General Passenger Agents in their respective territories.

Agricultural development work is handled under the supervision of the General Colonization Agent, who by preparation of booklets, correspondence, and otherwise, endeavors to influence persons to settle on agricultural lands in Santa Fe territory, and this work is also furthered by the publication at Topeka of a magazine called The Earth. Officials of the Traffic and Operating Departments cooperate in inducing industries to locate on the lines of said Company.

Employes actively and exclusively engaged in traffic solicitation and related work are Division Freight and Passenger Agents, located on line, and the General, District, Traveling, and City Freight and/or Passenger Agents, who work in or out of so-called city or uptown offices located on the line and also in the principal off-line cities of the United States. Live Stock Agents located at Kansas City and other points are also engaged in this class of work.

9. Work Relating to the Management, Operation, Care, or Protection of Buildings or Lands Not Devoted to or Used in Connection with Transportation.—The noncarrier buildings and lands of the Company are relatively few in number or acreage at any one point, and for the most part are managed, operated, and cared for by officers and employees who perform similar duties with respect to properties devoted to transportation. However, the Company has a ten-story office building at Topeka, to which employes who devote their entire time to its management, care, and operation are assigned.

10. Work Relating to Construction of Buildings and Lines of Railway.—No new buildings of any consequence and no new lines of railway are under construction by Company forces at this time, and such new construction work of any kind as is being carried on by Company forces is being performed by employes intermittently engaged in new construction and in repair work.

11. Work Relating to the Construction of New Equipment.—The Company constructs practically no new equipment, and none is under construction at this time.

12. Work Relating to Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service.—This work is carried on under the jurisdiction of the Mechanical Department. This Company's car shops at Topeka, Kansas, and San Bernardino, California, perform heavy repair and/or reconstruction work to both freight and passenger cars withdrawn from transportation service. Similar work with respect to freight cars only is carried on in the car shops of said Company located at various other points. Its principal shops where reconstruction and/or heavy repair work to locomotives withdrawn from transportation service is performed are located at Topeka, La Junta, Albuquerque, and San Bernardino, and smaller shops are located at various other points.

13. Work Performed by Foremen and Laborers in Stores, Reclamation, and Timber-Treating Plants.—The Company has large stores at Topeka and other points, from which the divisional stores and also the shops and car works are furnished materials and supplies. The reclamation plant of said Company is located at Chicago, Illinois, and timber-treating plants are located at Wellington, Kansas; Albuquerque, New Mexico; and National City, California.

In these stores and plants are handled only materials which have not been issued for use in construction or operation, or which, because of defects, have been withdrawn from transportation service and are being handled for the purpose of reclaiming such parts as are usable or can be repaired and selling the remainder as scrap.

14. Work Performed by Storekeepers, Sales Agents, and Buyers.—The duties of the Purchasing Department employes performing the above classes of work are exclusively confined to the inspection, selection, purchasing, storing, and issuing of materials and supplies for use in operation or construction.

15. Work Performed by Pumping Equipment Operators, Stationary Engineers and Firemen, Oilers, Coal Passers, and Water Tenders.—Pumping equipment operators operate pumping equipment to supply water for shops, stations, and other buildings and facilities, including storage tanks from which locomotives take water. Stationary steam engine employes operate stationary engines which supply light, heat, and power for shops, stations, and other facilities.

(Sgd.) A. L. CONRAD.

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, this 12th day of September 1934.

[SEAL] (Sgd.) CARL JUST,
Notary Public.

My commission expires September 17, 1935.

Plaintiffs' Exhibit 13

AFFIDAVIT

Filed October 11, 1934

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

HERBERT E. ENOCHS, being duly sworn, deposes and says that he is Chief of Personnel of The Pennsylvania Railroad Company, one of the plaintiffs in the above-entitled cause, and makes this affidavit knowing that it is to be used as evidence in this proceeding.

That affiant has been in the service of The Pennsylvania Railroad Company since 1895, or for a period of thirty-nine (39) years, part of such time being engaged in transportation work and part in wage and labor and personnel work; that during said period he has held, respectively, the offices of Supervisor of Labor & Wage Bureau and Superintendent of Labor & Wage Bureau, and since October 1, 1932, has occupied his present position; that his knowledge of the duties and the work of the various officers and employes in the several departments of the company has been procured through a study of the bylaws of the corporation, as well as its organization, and his dealings during the 39 years of his service with the various officers and employes in the several departments of the company, as well as his personal contact with the same in the performance of his own duties; that, because of this, deponent is generally familiar with the work and duties of the officers and employes of the various departments constituted in the organization of the company.

That affiant has submitted in this cause an affidavit verified September 12, 1934, and a copy of the report attached thereto showing the number of employees of The Pennsylvania Railroad Company receiving pay during the month of May 1934 not engaged in interstate commerce or in work so closely related to it as to be practically a part of it. Such report classifies those employees into sixteen (16) groups. This affidavit is intended to describe the duties and the work of those officers and employees under those separate groups.

1. Executives and General Officers.—This includes the President, the Vice President, who has supervision of the several departments of the company; the Vice President Assistant to President; the Vice President in Charge of Traffic; the Vice President in Charge of Finance and Corporate Relations; the Vice President in Charge of Real Estate, Valuation, and Taxation; the Vice President in Charge of Purchases, Stores, and Insurance; and the Vice President and Comptroller, as well as their staff assistants (except such as are included in other groups), and their clerical and office staffs. The work of these officers is executive, managerial, and directive. There are also included in this group officers and their staffs having charge of construction work, and the Valuation Engineer. In this classification the Vice President in Charge of Operation is not included; nor his assistants; nor the General Managers and Superintendents; nor the clerical, secretarial, and other forces handling directly matters of operation.

2. Finances, Custody, and Administration of Securities or Funds.—In this group are the Treasurer and his staff and office force, including the cashiers at the larger stations. There are included also forces engaged in stock transfer work. The work of these persons is confined to the receipt, handling, and disbursement of funds and the custody of securities.

3. Corporate Proceedings or Records.—In this group are the Secretary and his assistants, and their clerical and office employees. The work consists of arrangements for corporate meetings of stockholders, directors, and others, recording and keeping of minutes, the custody of records, the affixing of the corporate seal to documents, and in general doing such corporate work as the charter, bylaws, and organization of the company require.

4. Real Estate, Taxes, and Titles.—This group includes those employes whose work is the handling of matters relating to real estate and taxes, including the Real Estate and Tax Agents. It takes in also those employes engaged in the preparation and handling of agreements, deeds, and such documents as relate to lands, mortgages, deeds of trust, and titles to real property.

5. Experimentation and Research.—In this group are found those employees whose work is confined chiefly to the testing of metals, chemicals, fuels, and other materials. Their field is confined to scientific and technical investigation and research into matters of this character.

6. Claims and Litigation.—Under this heading are included the General Counsel and the other officers, as well as the employes, of the Legal Department. Their work has to do with matters pertaining to law, and the advising of the officers and employes of the company in connection with the same; supervising and dealing with claims and litigation affecting persons and property; handling proceedings before the Interstate Commerce Commission, the various state commissions and compensation boards, as well as the preparation of contracts and legal documents. It includes the officers and employes handling and investigating personal injury and death claims. It also includes the officers and employes of the Freight Claim Department, whose work is in the investigation and disposition of claims affecting freight shipments.

7. Accounting.—This includes the Auditors of the different accounts—freight, passenger, and disbursements—and their assistants and employes engaged in that work. It includes also the accounting forces at the Altoona Works and the forces there engaged in accounting service under the American Railway Association Rules. The work of these employes is confined to auditing, recording, and preserving accounts and records, keeping of books, compiling of statistics, and the preparation of reports to regulatory bodies, as well as to other departments of the company.

8. Advertisement, Industrial Development, and Traffic Solicitation.—The employes here are those engaged in traffic matters, including rates and the solicitation of traffic; as well as advertising and industrial investigation and development. The list includes such officers as the Division Freight and Passenger Agents, the Industrial Agents, and their clerical and stenographic forces; but excludes tourist guides or those handling special parties, or such spe-

cial agents as directly supervise or travel with any character of freight traffic.

9. Management, Operation, Care, or Protection of Buildings or Lands Not Devoted to or Used in Connection with Transportation.—This includes those persons employed in buildings owned, rented, or leased by the company, but none of which is used for purposes directly connected with operation or transportation, such as elevator operators, janitors, cleaners, and watchmen; but does not include the employes in any building which is devoted to or used in connection with transportation or operation of the railroad.

10. Work Relating to the Construction of Buildings and Lines of Railway.—This includes employes in electrical and other construction work. The company at this time is engaged in a large electrical construction work between New York City and Washington, D. C.

11. Work Relating to the Construction of New Equipment.—In this group there are included employes who are engaged in construction of freight and passenger equipment as well as locomotives. At this time this work is being chiefly done at Enola, Altoona, and Pitcairn, all in Pennsylvania.

12. Work Relating to Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service.—This classification includes those employes engaged in major repair of equipment which is withdrawn from service, this being done largely at the Altoona, Pa., works of the company. It includes major repairs of locomotives and cars which is known as "back-shop work", but does not include employes engaged in temporary, or what is known as "running repairs" to equipment which has not been withdrawn from transportation service.

13. Foremen and Laborers in Stores, Reclamation, and Timber-Treating Plants.—Here are included those employes who are engaged in the storehouse handling of materials and supplies, as well as those engaged in the reclamation of materials. Their duties are confined to the handling, care, custody, and distribution of materials and supplies not yet devoted to transportation, as well as to the handling and reclamation of scrap or other usable materials which have been withdrawn from transportation service.

14. Storekeepers, Sales Agents, and Buyers.—There are included in this group the Storekeepers and their assistants, and the buyers and inspectors, including their clerical, stenographic, and other forces. Their duties consist of the inspection, selection, purchasing, and issuing of materials and supplies not yet incorporated into operating facilities or devoted to transportation service.

15. Pumping-Equipment Operators, Stationary Engineers, and Firemen, Oilers, Coal Passers, and Water Tenders.—Included in this list are the pumping-equipment operators and pumpers who are engaged in pumping water to storage tanks, stationary engineers and firemen, steam-equipment oilers, coal passers, and water tenders in power and steam-heating plants of the company. But the classification does not include any employes engaged in the delivering of water from storage tanks to locomotives in operation, or the firing, oiling, or coaling of equipment in operation in transportation service.

16. All Other Employes Not Engaged in Interstate Commerce Not Included in the Preceding Classes, with Such Explanation as May be

Needed.—In this group are included officers and employes of the Insurance Department, officers and employes of the Personnel Department, and officers and employes of the Voluntary Relief and Pension Departments, none of whom, as the names of their departments indicate, is engaged in interstate transportation or in work so closely connected with the same as to be a part of it.

(Signed) HERBERT A. ENOCHS.

Sworn and subscribed to before me this 18 day of Sept. 1934.

(L. S.) (Signed) J. E. WILLIAMS,
Notary Public.

My Commission Expires March 8, 1935.

Plaintiffs' Exhibit 14

AFFIDAVIT

Filed October 11, 1934

STATE OF ALABAMA,
County of Mobile.

F. M. HICKS, being first duly sworn, deposes and says: that he is Executive Vice President of Gulf, Mobile and Northern Railroad Company, one of the plaintiffs in the above-entitled cause and makes this affidavit as to facts within his own personal knowledge and with full knowledge that his affidavit is to be used as evidence in the said cause.

That he has held the position of Executive Vice President of the said railroad company since April 1934; and that from March 1927 to April 1934, he held the position of Vice President, in charge of traffic, and also performed other duties as Assistant to the President. Prior to March 1927, affiant held the position of Traffic Manager and the office of Comptroller. He has been connected with the said company continuously since 1919, his first employment having been as station agent. His duties during the last several years have kept him in touch with the work done in all departments of the said railroad organization and, with a view to qualifying himself to make this affidavit, he has made special inquiry and observation to confirm his understanding of the facts as to the duties of employees in each department.

Affiant has before him an affidavit made by R. E. DeNeefe, Comptroller of Gulf, Mobile and Northern Railroad Company, to which affidavit is attached a report or statement purporting to show the number of employees of the said company receiving pay during the month of May 1934, and not engaged in interstate commerce or in work so closely related thereto as to be a part thereof. Said statement separates employees so classified as not engaged in interstate commerce, or in work so closely related thereto as to be a part thereof into eleven different groups.

Affiant undertakes in this affidavit to describe the duties of and the work performed by the officers and employees of the Gulf, Mobile and Northern Railroad Company in each of the groups or classes mentioned and described in the said statement or report of the Comptroller.

1. Executive and General Officers.—The officers and employees included in this group and their several duties are as follows: [illegible]

President of the Company, who is a member of the Board of Directors and ex officio a member of all standing committees, is the chief executive officer and has general management and control of the Company's business and affairs subject only to the orders and direction of the Board of Directors and of the Executive Committee; decides questions of policy; receives reports from other officers and heads of departments and exercises general supervisory control over the business of the Company. The Chairman of the Board presides at the meetings of the Board of Directors and is ex officio a member of all standing committees. He has authority to require information about the affairs of the company to be furnished him and this he communicates to the Board of Directors. The Chairman of the Executive Committee presides at meetings of that committee and at meetings of the Board in the absence of the Chairman of the Board. He, too, is ex officio a member of all standing committees. The Vice President is a member of the Board of Directors, resides in New York, and handles such items of business, usually of a financial nature, as may be referred to him. The Executive Vice President has special charge of all traffic matters and, in the absence or at the direction of the President, handles all matters of a general nature pertaining to the business of the Company. The Valuation Engineer devotes his entire time to the investigation and clearing up of questions pertaining to the valuation of the Company's property. The General Agent handles questions involving complaints of the public as represented by communities along the line and such other duties as the President may require of him. The other persons in this group, other than the three porters on business cars, are secretaries who keep files and handle correspondence and perform the usual office duties of stenographers and secretaries. The porters on the business cars cook and serve meals and keep the cars in order as comfortable living quarters.

2. Finances, Custody, and Administration of Securities and Funds.—The sole duties of the Treasurer and Assistant Treasurer are to receive and keep the funds and securities of the Company, and see that the funds are paid out only on proper vouchers and that funds not needed for immediate use are made to earn through investments or through savings accounts in the banks. The other persons in this group are bookkeepers or clerks in the Treasurer's office.

3. Corporate Proceedings and Corporate Records.—The Secretary keeps the minutes of meetings of stockholders, of the Board of Directors, and of the Executive Committee, sends out notices of meetings as required by the bylaws, signs and affixes the corporate seal to certificates of stock, affixes the corporate seal to corporation contracts where the seal is required, answers inquiries with respect to the corporate affairs, and in general does the clerical work necessary to keep in order the books, papers, and files pertaining to the internal affairs of the corporation.

4. Claims and Litigation.—The attorneys in this group deal with controversies of all kinds growing out of past transactions such as the application of rates, the handling of freight, and the performance of contracts. They attend conferences, agree upon settlements, file suits in the courts for the company, defend suits brought against the company, appear before State public service commissions and the Interstate Commerce Commission in matters in which the company

is interested and handle tax matters of all kinds. They prepare contracts, pass upon and construe contracts, and advise as to legal rights and remedies. Of the said attorneys, only the General Counsel and the General Attorney devote their entire time to the business of the Company. The Chief Claim Clerk and the Loss and Damage Claim Investigator and the Freight Claim Agent devote their time to the investigation and adjustment of claims in favor of and claims against the Company growing out of the previous handling of traffic. And those persons shown as secretaries perform only the duties usually assigned to secretaries in an office. The Chief Surgeon has general direction of the care and treatment of persons injured on the railroad, whether employees or others, and the general supervision of the treatment of the illness of employees under the company hospital rules.

5. Accounting.—The Comptroller exercises general control and supervision over the books, accounts, documents, and records (other than internal or corporate records) of the company and all the persons in this group are engaged in the duties of making or supervising the making of entries, the checking and verifying of accounts of agents, by whom funds are collected, making bills for amounts owing the company and checking bills presented against the company and in general auditing all bills payable and bills receivable, making a record of receipts and disbursements so that the books of the Accounting Department shall at all times reflect the true condition of the company's finances. The said persons also prepare and file with public authorities statements and reports required by law to be filed; and they also furnish to other departments of the railroad organization information preserved by the records of this department.

6. Advertising, Industrial, Development, and Traffic Solicitation.—The General Freight Agent in charge of Solicitation and his three Assistants and the Assistant to the Executive Vice President are exclusively engaged in the solicitation of traffic and in the supervision and direction of such solicitation. And the 63 traffic solicitors, distributed among the principal cities of the United States, devote their time exclusively to the solicitation of business except that 7 of the said 63 solicitors are authorized to sign and in some instances do sign export bills of lading. The General Freight Agent and his four Assistants look after the fixing of rates, disputes over rates, including hearings before public-service commissions, and divisions of rates with other carriers and, generally, attend to all matters involving rules, regulations, and tariffs. All these officers and employees have their office stenographic help. The Development Director devotes his time to the improvement of agriculture and the discovery and development of natural resources in the territory adjacent to our lines.

7. Management, Operation, Care, or Protection of Buildings or Lands Not Devoted to or Used in Connection With Transportation.—We have only the six employees mentioned whose duties, all in the general office building at Mobile, are indicated by their designations as porters, elevator boy, and switchboard operators.

8. Work Relating to Reconstruction or Major Repair of Equipment Withdrawn from Transportation Service.—The 150 employees com-

posing this group are exclusively engaged in back-shop work or foundry work and in making classified repairs to equipment withdrawn from transportation.

9. Foreman and Laborers in Stores and Timber-Treating Plants.—The persons in this group are exclusively engaged in the loading, unloading, storing, and stocking of materials not yet devoted to transportation.

10. Storekeepers, Sales Agents, and Buyers.—The employees in this group are the Manager of Purchases and Stores and his office force, and one storekeeper and his office force. They buy and store and have the custody and distribution of stationery, fuel, lumber, and other materials and supplies used in carrying on the business of the Company.

11. Pumping-Equipment Operators, Stationary Engineers, Firemen, and Oilers.—The pumping-equipment operators are engaged in the working of pumps to fill the water tanks from which locomotives are supplied; stationary engineers, firemen, and oilers do their work around stationary engines in the shops.

Affiant further states that the duties of the office force in each instance referred to above herein are confined to matters within the jurisdiction or scope of the duties of the head of the office or department in which the "office force" works.

F. M. HICKS.

Sworn to and subscribed before me this 20th day of September 1934.

[SEAL] W. H. DUFFEE.
Notary Public, Mobile County, Alabama.

Dated: Mobile, Alabama, September 20, 1934.

Plaintiffs' Exhibit 15

AFFIDAVIT OF GEORGE DUNGLINSON, JR., MANAGER FUEL DEPARTMENT, NORFOLK AND WESTERN RAILWAY COMPANY, ONE OF PLAINTIFFS HEREIN

Filed October 11, 1934

The undersigned, George Dunglinson, Jr., Manager of the Fuel Department of Norfolk and Western Railway Company, being first duly sworn, deposes that:

The Railway Company owns three collieries adjacent to its main line in West Virginia. They were purchased and have since been operated for the sole purpose of furnishing a part of the fuel coal supply used in the operation of the railroad. Their entire output, except for small amounts of coal furnished to mine employees, is consumed in operation of the railroad.

The Fuel Department of the Railway Company operates the mines without intervention of a subsidiary corporation—the operation of the mines being a direct departmental activity of the Railway Company. The Railway Company pays the salaries and wages of the officers and of the miners and employees in the Fuel Department. The wages and working conditions of employees, in common with the employees of other operators in the district, are governed by agreement effective April 1, 1934, between the Operators Association

of Williamson Field (which includes the Railway coal operations) and The United Mine Workers of America. The agreement prescribes not only the hours and working conditions of the mine workers in the employ of the Railway Company but also their rates of pay, generally upon time and piecework basis.

Insofar as the Railway Company is an operator of coal mines it has subjected itself to Southern Subdivisional Code Authority No. 2 of Division No. 1, Bituminous Coal Industry, organized under National Industrial Recovery Act, and under such Code, the Code Authority undertakes to attain uniformity of wage and working conditions among all mine workers in the district and field of mining operations.

There were in the month of May 1934 a total of 979 officers and employees in the Fuel Department of the Railway Company. Their total earnings in the month of May 1934 were $85,287.46. The amount of their contributions for the month calculated at two percent of their compensation up to $300.00 a month would have amounted to about $1,690.00 and the amount of the contribution of the Railway on their account would have amounted to about $3,380.00 monthly. The contributions of the Railway Company in the month mentioned would have been equivalent to about 4.2 cents per ton of coal produced and would have increased the cost of production by that amount.

Of the 976 employees (excluding three salaried officers) in May 1934, 516 were pieceworkers, that is, paid on the basis of tonnage of coal handled; of these pieceworkers 51 are designated machine men who undercut the coal prior to blasting, 8 drillers, and 457 miners who drill, blast, and load the coal into mine cars. The remaining 460 mine employees are paid on time basis at rates per month or hour; they include superintendents and foremen, office managers and clerks, store managers and clerks, electricians and mechanics, men employed in mine haulage, men maintaining mine tracks, operating and maintaining ventilation and drainage, tipple men and other men engaged in incidental work inside and outside of the mines. The work of all these employees of Railway Fuel Department in mining and production of coal ends with the delivery of the coal at the tipple into the vehicles of the Railway Company. They perform no other service for the Railway Company.

The Interstate Commerce Commission, under Section 20 of the Act to Regulate Commerce, has required the Railway Company to carry the investment in its fuel coal mines in Account No. 705 of the Commission's Classification of Accounts, as property entirely distinct from transportation property and not operated in connection with the transportation or carrier service of the Railway Company.

(Signed) GEORGE DUNGLINSON, JR.,
Manager Fuel Department,
Norfolk and Western Railway Co., Bluefield, West Virginia.

DISTRICT OF COLUMBIA, *ss:*

Subscribed and sworn to before me this 19th day of September 1934.

[SEAL] (Signed) P. K. HOWARD, *Notary Public.*

My Commission expires May 24, 1935.

Plaintiffs' Exhibit 16

AFFIDAVIT OF HERBERT B. HUSBAND, GENERAL MANAGER, THE CHESAPEAKE AND OHIO RAILWAY COMPANY FUEL-MINE OPERATIONS

Filed October 11, 1934

The undersigned, Herbert B. Husband, General Manager of the Chesapeake and Ohio Railway Company Fuel-Mine Operations, being first duly sworn, deposes that:

The Chesapeake and Ohio Railway Company controls, either directly or through a wholly owned subsidiary, and operates three coal mines adjacent to its lines in West Virginia. They were acquired and are being operated for the sole purpose of furnishing a part of the fuel-coal supply used in the operation of the railroad, and their entire output except for small amounts of coal furnished to mine employees is consumed in operation of the railroad. The three mines so controlled are known as the Dorothy, Sarita, and Eunice mines. Of these at the present time the Eunice mine alone is in regular operation, although developments under way at the Dorothy mine result in the production of relatively small amounts of coal which is utilized for the same purpose as the coal produced in the Eunice mine.

The Chesapeake and Ohio Railway Company operates the mines without the intervention of a subsidiary corporation, but the operation of the said mines for accounting and all other purposes is kept entirely distinct from all other operations of the Chesapeake and Ohio Railway Company, and is carried on under the style of the Chesapeake and Ohio Railway Company Fuel-Mine Operations, of which this deponent is General Manager. The Chesapeake and Ohio Railway Company periodically places the Chesapeake and Ohio Railway Company Fuel-Mine Operations in funds for the purpose of paying its operating expenses, including all salaries and wages. The wages and working conditions of employees, in common with the employees of other operators in the district, are governed by agreement, effective April 1, 1934, between the Kanawha Coal Operators Association and the United Mine Workers of America. The agreement prescribes not only the hours and working conditions of the mine workers in the employ of the Railway Company but also their rates of pay, generally upon a time and piecework basis.

There were in the month of May 1934 a total of 237 officers and employees of the Chesapeake and Ohio Railway Company Fuel-Mine Operations. Their total earnings in the month of May 1934 were $23,697.02. The amount of their contributions during such period, calculated at 2% of their compensation up to $300.00, would have amounted to about $467.00 monthly, and the amount of the contribution of the Chesapeake and Ohio Railway Company on their account would have amounted to about $934.00 monthly. The contributions of the Railway Company in the month mentioned would have been equivalent to about 3.74 cents per ton of coal produced and would have increased the cost of production by that amount.

In May 1934, of the 236 employees (excluding one salaried officer), 4 were machine men, who undercut the coal prior to blasting, and 67

were carried on the pay roll as coal loaders, in which designation is included men who drill, blast, and load the coal into the cars. The 4 machine men were paid on a piecework basis, that is, on the basis of tons handled, and the 67 coal loaders were so paid for the most part, though occasionally some of them may have received compensation on a time basis of rates per day or hour. The remaining 165 mine employees are paid on time basis at rates per month, day, or hour; they include mine foremen, master mechanic, outside foremen, chief clerk, clerk, and stenographer, store manager and clerks, electricians, mechanics, drillers, operators of mechanical loaders, men employed in mine haulage, men maintaining tracks, tipple men, and others classified as helpers and laborers engaged in incidental work inside and outside of the mines. The work of all of these employees of the Chesapeake and Ohio Railway Company Fuel Mine Operations in mining and production of coal ends with the delivery of the coal at the tipple into the vehicles of the Railway Company; and they perform no service for the Railway Company other than that described above.

No part of the investment of the Chesapeake and Ohio Railway Company in its fuel-coal mines is carried in Account No. 701, Investment in Road and Equipment, of the Commission's Classification of Accounts. Part of said investment is carried in Account No. 705, Miscellaneous Physical Property, as property entirely distinct from transportation property and not operated in connection with the carrier or transportation service of the Railway Company; a part, representing the ownership by the Chesapeake and Ohio Railway Company of the stock of its subsidiary company, is carried in Account No. 706, Investments in Affiliated Companies.

HERBERT B. HUSBAND,
General Manager the Chesapeake and Ohio Railway Company Fuel Mine Operations.

Subscribed and sworn to before me this 20th day of September 1934.

[SEAL] JOS. E. POWERS, *Notary Public.*

My commission expires Dec. 31, 1936.

Plaintiffs' Exhibit 17

AFFIDAVIT

Filed October 11, 1934

STATE OF ILLINOIS,
County of Cook, ss:

The undersigned, W. B. MCKINSTRY, being first duly sworn, deposes and says that he resides at Chicago, Illinois; that he is employed as Comptroller of the Illinois Central Railroad Company; that he has knowledge of the facts herein stated; that the statistics herein contained have been carefully compiled under his direction; and that the facts and statistics herein stated are correct.

Affiant further deposes and says that said Illinois Central Railroad Company, among other operations and services performed by it as a carrier by railroad, conducts an extensive suburban passenger service, operated by means of electricity, in the City of Chicago, State of Illinois, and between that city and several of its suburbs, said suburban service extending from Randolph Street, in the City of Chicago, Illinois, to South Chicago, Illinois, Matteson, Illinois, and Blue Island, Illinois, respectively, with intermediate stations for suburban travel only located at distances of approximately every half mile; that this suburban service is operated on tracks and with special equipment and facilities, including stations, constructed and used for such purposes; that all of said tracks and facilities devoted to such suburban service are located within the State of Illinois, and are in addition to other tracks, equipment, and facilities of said railroad company used by it in the operation of its so-called "through trains" which carry interstate passengers and property and which are operated by steam motive power; and that said suburban tracks and facilities are used exclusively for such suburban service, except that occasionally at night and in emergencies other trains are operated upon some of said tracks.

Affiant further deposes and says that the suburban operations of said railroad company during May 1934 were typical of the monthly average of such operations during a yearly period and of those that exist at this time; that there were employed by said railroad company during the month of May 1934 a total of 666 employees whose duties were devoted exclusively to said suburban service; that included within this total were 252 trainmen, 178 maintenance-of-equipment and mechanical-department employees, 82 station attendants, 40 janitors and cleaners, and others; that the number of passengers handled in such suburban service by said railroad company during the month of May 1934 was 2,059,454, or a daily average of 66,434; that the number of loaded trains operated during that month was 19,764, or a daily average of 638; that the number of light or unloaded trains operated during said month was 2,163, or a daily average of 70; that no express, mail, or baggage, other than hand baggage retained in the possession of passengers, is carried upon said suburban trains, except that six trains daily, or less than one percent of the total, carry pouch mail only consigned from or to the Chicago post office and post offices located in the territory served by this suburban line, and except further that 54 trains daily carry a few bundles of newspapers consigned from publishers in Chicago to dealers in said suburban territory.

Affiant further deposes and says that while some of the employees who are employed in this suburban service occasionally leave it for some other service, the great majority of the employees so employed in such suburban service have been exclusively engaged therein for years and that many of them have spent the period of their entire railroad service, in numerous instances extending over twenty-five years, exclusively therein.

Affiant further deposes and says that he is duly authorized by said Illinois Central Railroad Company to make this affidavit on its be-

half and that he makes this affidavit with the knowledge and intent that it shall be used in evidence in the trial of the above-entitled cause, or any hearing that may be held therein.

W. B. McKINSTRY,
Illinois Central Railroad Company, Chicago, Illinois.

Subscribed and sworn to before me this 19 day of September, A. D. 1934.

GENEVA W. HAYS,
Notary Public.

My Commission expires February 25, 1936.

Plaintiffs' Exhibit 18

AFFIDAVIT

Filed October 11, 1934

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

HERBERT A. ENOCHS, being duly sworn, deposes and says that he is Chief of Personnel of The Long Island Rail Road Company and also of The Pennsylvania Railroad Company, both plaintiffs in the above-entitled cause, with office in Broad Street Station Building, Philadelphia, Pa., and makes this affidavit knowing that it is to be used as evidence in this proceeding.

Deponent further says that The Long Island Rail Road Company operates a passenger commutation service from and to points on Long Island, N. Y., to and from other points on its line, principally however to and from New York City, but all of which points are nevertheless entirely within the State of New York; that deponent has caused to be made an investigation for the month of May 1934 in such intrastate service of the number of trains operated, the number of passenger cars operated, the number of employes engaged, and the number of revenue passengers carried—all, however, in such intrastate service. That such investigation has produced the following figures:

Total number of trains operated	25,615
Total number of passenger cars operated	151,911
Number of employes:	
Enginemen and motormen	173
Firemen	43
Conductors	150
Ticket Collectors	362
Brakemen	11
Guards	98
Total	837
Number of revenue passengers carried	6,694,791

Deponent further says that The Pennsylvania Railroad Company operates a passenger commutation service from and to points altogether within the State of Pennsylvania to and from other points on its lines within the State of Pennsylvania, but principally into and out of Pittsburgh, Pennsylvania; that deponent has caused to be made an investigation for the month of May 1934 in such intrastate

service of the number of trains operated, the number of passenger cars operated, the number of employes engaged, and the number of revenue passengers carried—all, however, in such intrastate service. That such investigation has produced the following figures:

Total number of trains operated	3,507
Total number of passenger cars operated	12,181
Number of employes:	
Engineers and motormen	45
Firemen	45
Conductors	44
Brakemen	68
Total	202
Number of revenue passengers carried	543,452

(Sgd.) HERBERT A. ENOCHS.

Subscribed and sworn to before me this 18th day of September 1934.

[SEAL] (Sgd.) J. E. WILLIAMS,
Notary Public.

My Commission Expires March 9, 1935.

Plaintiffs' Exhibit 19

AFFIDAVIT

Filed October 11, 1934

STATE OF NEW YORK,
County of New York, ss:

MICHAEL E. WELCH, being first duly sworn, on his oath did depose and say:

That he is employed by The New York Central Railroad Company, one of the plaintiffs in the above-entitled suit, as Superintendent in charge of the Grand Central Terminal, in New York, N. Y.; the Electric Division, which comprehends the lines of railroad between the Grand Central Terminal and North White Plains, N. Y., and between Grand Central Terminal and Croton, N. Y.; the Putnam Division; between New York, N. Y., and Brewster, N. Y., and the branch of the latter division between Van Cortlandt Park, in New York, N. Y., and Yonkers, N. Y.; and the Harlem Division, between North White Plains, N. Y., and Chatham, N. Y., all of said lines of railroad under the jurisdiction of the deponent being located wholly within the State of New York. As such Superintendent, the deponent is in charge of the operation of trains, stations, and yards of the said plaintiff within the territories of the said divisions and familiar with the matters hereinafter set forth. The deponent makes this affidavit with knowledge that it is to be filed in the above-entitled cause.

That between Grand Central Terminal, in New York City, N. Y., and Brewster, N. Y., distant 52 miles from said Grand Central Terminal, and between said Grand Central Terminal and points such as Mount Vernon and North White Plains on the same division, which are intermediate between said Grand Central Terminal and

Brewster, The New York Central Railroad Company operates an extensive suburban passenger train service. This entire service is wholly intrastate within the State of New York. Said trains originate and terminate between the said points, and no cars in the said trains operate in continuous or unbroken service to points beyond said termini.

Similarly, between Sedgwick Avenue, in the City of New York, N. Y., and Brewster, N. Y., a distance of 53 miles, and constituting the Putnam Division of the said Railroad Company, and between said Sedgwick Avenue, in the City of New York, and Getty Square, in the City of Yonkers, N. Y., a distance of 8 miles, the latter being a branch of the said Putnam Division, and between points intermediate of the said termini, the said railroad company operates a number of passenger trains in suburban service. All of these trains operate wholly intrastate within the State of New York, and no cars in the said trains operate in continuous or unbroken service to points beyond said termini.

In the said service the said railroad company operates 145 suburban passenger trains per day, and of these 110 trains per day carry no mail, baggage, or express whatsoever. The remaining 35 trains per day, in addition to the passenger service, do also include baggage cars and combination passenger and baggage cars in which are transported baggage, mail, and express, principally of a local character. In the said service there are regularly and exclusively employed 162 engineers, firemen, conductors, assistant conductors, and brakemen, whose aggregate pay roll is $27,770 per month.

Similarly, between Grand Central Terminal and Peekskill, N. Y., a distance of 40 miles, and between points intermediate of the said termini, the said railroad company operates a considerable number of suburban passenger trains, and no cars in the said trains operate in continuous or unbroken service to points beyond said termini. This entire service is wholly intrastate within the State of New York.

Deponent avers that all of the passenger traffic on said Putnam Division and the branch thereof was local and intrastate within the State of New York, and in substantiation thereof, deponent avers that he has caused to be made an examination of the record of ticket sales for the month of June 1934 (that being the last month readily available and representative of continuous conditions) at all stations on said Putnam Division and branch, and upon such examination it was found, and deponent avers, that during said entire month not one ticket was sold for passenger transportation from any of said stations to any point outside of the State of New York, nor to any other point in the State of New York through any other State.

Deponent avers that the passenger service performed on said line between Grand Central Terminal and Brewster (composed of a portion of the Electric Division and of the Harlem Division) on the passenger trains above referred to, was predominantly, if not entirely, local and intrastate within the State of New York, and in substantiation thereof the deponent avers that he caused an examination of the ticket sales of stations on said line for the month of June 1934 to be made, which month is representative of continuous conditions, and upon said examination it was found, and deponent avers, that there were sold an aggregate of 152,580 tickets for local rides wholly intrastate in the State of New York. Some of said tickets were

one-way passenger tickets, some thereof round-trip tickets, some thereof regular and school commutation tickets, and some thereof so-called 25- and 50-ride family tickets. The extension of the multiple ride tickets to the approximate average number of rides used during said month produces an aggregate number of such local rides on the said section of railroad for the said month of 974,259. For the same month, at the same stations, there were sold an aggregate of 1,322 tickets to points outside of the State of New York, of which 379 were one-way tickets and 943 were round-trip tickets, representing an aggregate number of potential rides of 2,265. Of the said tickets to points outside of the State of New York, 1,156 were sold at the Grand Central Terminal in New York City for use over said section of railroad, but to points beyond the State line, leaving as the number of interstate tickets sold on said section of line at stations other than the Grand Central Terminal only 166 during the entire month. This latter number represents approximately two one-hundredths of 1% of the aggregate passenger service performed on said section of railroad, and leaves as the percentage of wholly intrastate passenger service so performed 99.98% of the said aggregate passenger service. Even this insignificant interstate passenger service from points on said division was not all, and probably no part thereof was handled on any of the trains above mentioned, for the reason that there are, in addition to said trains, a limited number of through trains that operate on said Harlem Division from the Grand Central Terminal, in New York, to North Adams, Massachusetts, which have not been included in the number of trains above referred to and the train crews of which are not included in those above referred to, and the overwhelming probability is that all of the interstate passenger tickets above referred to were used for rides on said through trains, and were not used for rides on the local suburban trains above referred to.

Deponent avers that, to a considerable extent, on the Hudson Division, in the case of trains operated between Grand Central Terminal and Peekskill, N. Y., and points intermediate thereof, a substantial amount of wholly intrastate passenger service is performed, the precise statistics of which are not readily available, for which reason the number of local trains in said service and the number of employees engaged thereon have not been included in the foregoing figures.

MICHAEL E. WELCH.

Subscribed and sworn to before me this 17th day of September 1934.

[NOTARIAL SEAL]

CHARLES McLERNON,
Notary Public, Nassau County.

Certificate Filed in New York County, N. Y. Co. Clk's No. 153, Reg. No. 5Mc128. Commission Expires March 30, 1935.

Plaintiffs' Exhibit 20

AFFIDAVIT

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

FRANK J. FELL, Jr., being duly sworn, deposes and says that he is Vice President and Comptroller of The Long Island Rail Road

Company, one of the plaintiffs in the above-entitled cause, with office at Broad Street Station Building, City of Philadelphia, Pennsylvania, and, as Comptroller of said company, has charge of its accounts; that deponent makes this affidavit knowing that it is to be used as evidence in this proceeding.

Deponent further says that, under his direction, an examination has been made of the accounts showing the gross earnings from passenger revenue of The Long Island Rail Road Company for the year 1933; and such examination shows that the total passenger earnings amounted to $17,145,203.43, of which $17,126,241.30 were earnings from intrastate passenger traffic and but $18,962.13 were earnings from interstate passenger traffic.

(Signed) F. J. Feil, Jr.

Subscribed and sworn to before me this 18th day of September 1934.

[SEAL] (Signed) J. E. Williams,
Notary Public.

My Commission Expires March 9, 1935.

Plaintiffs' Exhibit 21

AFFIDAVIT

Filed October 11, 1934

State of Connecticut,
County of New Haven, ss:

George T. Carmichael, being duly sworn, deposes, and says that he is the General Auditor of The New York, New Haven and Hartford Railroad Company, one of the plaintiffs in the above-entitled cause, and has been such since June 9, 1920; that as such he is in charge of the general books of said Company and is familiar with the matters hereinafter set forth, and makes this affidavit with the understanding that it is to be used as evidence in the above-entitled cause.

The New York, New Haven and Hartford Railroad Company is a corporation engaged not only in the business of a common carrier by railroad but in addition the said Company is also to a large extent an investor in, and the owner of, stocks, bonds, and other securities of other companies, and is the owner of a large number of parcels of real estate not used for transportation purposes, all as hereinafter more particularly set forth.

As an index to the extent of the holdings of said Company in securities of other companies, the deponent says that, as of July 31, 1934, The New York, New Haven and Hartford Railroad Company had investments in shares of stock of other companies aggregating in excess of $108,000,000, and investments in bonds and notes of other companies aggregating in excess of $65,000,000. Of the physical properties of the said Company, on the basis of the valuation thereof as made by the Interstate Commerce Commission as of June 30, 1915, brought down to September 1, 1934, by the deduction of retirements and the addition of acquirements, there are in excess of $7,000,000 thereof classified by the said Interstate Commerce Commission as

noncarrier property; and, similarly, in the case of lines of railroad in the possession of The New York, New Haven and Hartford Railroad Company under leases, there are physical properties so classified as noncarrier properties aggregating in excess of $1,000,000.

Among the major items of gross earnings of said Company for other than transportation service are the following items of revenue for the year ended June 30, 1934, to wit:

Sale of electric power to other Companies and tenants	$960,000
Rent of buildings and other properties	120,000
Miscellaneous rent income	1,979,000
Miscellaneous nonrailway physical property	52,000
Dividend income	1,129,000
Income from funded securities	2,320,000
Income from unfunded securities and accounts	243,000

Deponent says that a considerable number of the officers and employees of the said Company are continuously engaged in duties in connection with the investment in, attention to, accounting and financing of, the investments and assets above referred to, not constituting the work of interstate transportation or work so closely related thereto as to be a part thereof, and being work not connected with commerce at all, while many other officers and employees of the said Company are largely engaged in such duties.

(Signed) GEORGE T. CARMICHAEL.

Subscribed and sworn to before me this 17th day of September 1934.

[SEAL] (Signed) JAMES F. TOOHEY,
Notary Public.

Plaintiffs' Exhibit 22

AFFIDAVIT

Filed October 11, 1934

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

FRANCIS J. FELL, Jr., being first duly sworn, deposes and says that he is Vice President and Comptroller of The Pennsylvania Railroad Company, one of the plaintiffs in the above-entitled cause, and has continuously been such since June 1, 1929, prior to which time, for many years, he had been Comptroller, Deputy Comptroller, and Assistant Comptroller of such Company; that as such he is in charge of the accounts of said Company and is familiar with the matters hereinafter set forth, and makes this affidavit with knowledge of the fact that it is to be used as evidence in the above-entitled cause.

The Pennsylvania Railroad Company is a corporation engaged not only in the business of a common carrier by railroad but in addition the said Company is also to a large extent an investor in, and the owner of, stocks, bonds, and other securities of other companies and of the United States Government, and is the owner of large numbers of parcels of real estate not used for transportation purposes, all as hereinafter more particularly set forth.

As an index to the extent of the holdings of said Company in securities of other companies, the deponent says that, as of July 31, 1934, The Pennsylvania Railroad Company had investments in shares of stock of other companies aggregating in excess of $569,700,000, and investments in bonds and notes of other companies and of the United States Government aggregating in excess of $105,400,000. Of the physical properties of the said Company, on the basis of the valuation thereof as made by the Interstate Commerce Commission as of June 30, 1918, and other valuation dates, brought down to December 31, 1933, by the deduction of retirements and the addition of acquirements, there are in excess of $17,000,000 thereof classified by the said Interstate Commerce Commission as noncarrier property; and, similarly, in the case of lines of railroad in the possession of The Pennsylvania Railroad Company under lease, there are physical properties so classified as noncarrier properties aggregating in excess of $28,000,000.

Among the major items of gross earnings of said Company for other than transportation service are the following items of revenue for the year ended June 30, 1934, to wit:

Sale of electric power to other Companies and tenants	$1,697,000
Rent of buildings and other properties	1,470,000
Miscellaneous rent income	2,000,000
Miscellaneous nonrailway physical property	37,000
Dividend income	22,600,000
Income from funded securities	6,200,000
Income from unfunded securities and accounts	3,300,000

Deponent says that large numbers of the officers and employees, including Attorneys, Accountants, Renting Agents, clerical forces, and others of the said company are continuously engaged in duties in connection with the investments in, attention to, accounting and financing of, the investments and assets above referred to, not constituting the work of interstate transportation or work so closely related thereto as to be a part thereof, and being work not connected with commerce at all.

(Signed) F. J. FELL, Jr.
(Signed) FRANCIS J. FELL, Jr.

Subscribed and sworn to before me this 21st day of September 1934.

[SEAL] (Signed) N. SPERINO,
Notary Public.

My Commission Expires April 1, 1935.

Plaintiffs' Exhibit 23

AFFIDAVIT

Filed October 11, 1934

STATE OF NEW YORK,
County of New York, ss:

LEROY V. PORTER, being first duly sworn, deposes and says:

That he is Comptroller of The New York Central Railroad Company, one of the plaintiffs in the above-entitled cause, and has con-

tinuously been such since February 1, 1930, prior to which time, for many years, he had been Assistant Comptroller of such Company; that as such he is in charge of the accounts of said Company and is familiar with the matters hereinafter set forth, and makes this affidavit with knowledge of the fact that it is to be used as evidence in the above-entitled cause.

The New York Central Railroad Company is a corporation engaged not only in the business of a common carrier by railroad but in addition the said Company is also to a large extent an investor in, and the owner of, stocks, bonds, and other securities of other companies and is the owner of large numbers of parcels of real estate not used for transportation purposes, all as hereinafter more particularly set forth.

As an index to the extent of the holdings of said Company in securities of other companies, the deponent avers that, as of July 31, 1934, The New York Central Railroad Company had investments in shares of stock of other companies aggregating in excess of $184,000,000, and investments in bonds and notes of other companies aggregating in excess of $67,000,000. Of the physical properties of the said Company, on the basis of the valuation thereof as made by the Interstate Commerce Commission as of June 30, 1917, brought down to December 31, 1933, by the deduction of retirements and the addition of acquirements, there are in excess of $43,000,000 thereof classified by the said Interstate Commerce Commission as noncarrier property; and, similarly, in the case of lines of railroad in the possession of The New York Central Railroad Company under lease, there are physical properties so classified as noncarrier properties aggregating in excess of $15,000,000.

Among the major items of gross earnings of said Company for other than transportation service are the following items of revenue for the year ended June 30, 1934, to wit:

Sale of electric power to other companies and tenants	$1,679,000
Rent of buildings and other properties	1,814,000
Miscellaneous rent income	4,215,000
Miscellaneous nonrailway physical property income	1,682,000
Dividend income	3,942,000
Income from funded securities	5,389,000
Income from unfunded securities and accounts	2,113,000

Deponent avers that numbers of the officers and employees, including Attorneys, Engineers, Accountants, Renting Agents, Appraisers, clerical forces, and others of the said Company are continuously engaged in duties in connection with the investment in, attention to, accounting and financing of, the investments and assets above referred to not constituting the work of interstate transportation or work so closely related thereto as to be a part thereof.

LEROY V. PORTER.

Subscribed and sworn to before me this 17th day of September 1934.

[NOTARIAL SEAL]

J. H. WEST,
Notary Public, Westchester County.

N. Y. Co. Clk.'s No. 102, Reg. No. 6-W-68. Commission expires March 30, 1936.

Plaintiffs' Exhibit 24

AFFIDAVIT

Filed October 11, 1934

STATE OF NEW YORK,
County of New York, ss:

FREDERICK VAN NOTE, being first duly sworn, deposes and says: That he is Controller of the Southern Pacific Company, one of the plaintiffs in the above-entitled cause, and has continuously been such since August 1, 1932, prior to which time for many years he had been Assistant Controller of such Company; that as such he is in charge of the accounts of said Company and is familiar with the matters hereinafter set forth, and makes this affidavit with knowledge of the fact that it is to be used as evidence in the above-entitled cause.

The Southern Pacific Company is a corporation engaged not only in the business of a common carrier by railroad but in addition the said Company is also to a large extent an investor in and the owner of stocks, bonds, and other securities of other companies, and is the owner of numerous parcels of real estate not used for transportation purposes, all as hereinafter more particularly set forth.

As an index to the extent of the holdings of said Company in securities of other companies, the deponent says that, as of July 31, 1934, the Southern Pacific Company had investments in shares of stock of other companies aggregating in excess of $386,000,000 investments in bonds and notes of other companies aggregating in excess of $192,000,000, and it also had investments in stocks and bonds of other companies, the cost of which is inseparable, in excess of $58,000,000. Of the physical properties of the said Company, on the basis of the valuation thereof as made by the Interstate Commerce Commission as of June 30, 1916, there are in excess of $28,000,000 thereof classified by the said Interstate Commerce Commission as noncarrier property; and, similarly, in case of lines of railroad owned by subsidiary companies of the Southern Pacific Company, there are physical properties so classified as noncarrier properties aggregating in excess of $13,000,000.

Among the major items of gross earnings of said Company for other than transportation service are the following items of revenue for the year ended December 31, 1933:

Sale of electric power to others	$8,000
Rent of buildings and other properties	167,000
Miscellaneous rent income	1,180,000
Miscellaneous nonrailway physical property	21,000
Dividend income	20,422,000
Income from funded securities	9,749,000
Income from unfunded securities and accounts	94,000

Deponent says that large numbers of the officers and employees including attorneys, accountants, clerical forces, and others of the said Company are continuously engaged in duties in connection with the investment in, attention to, accounting and financing of, the invest-

ments and assets above referred to not constituting the work of interstate transportation or work so closely related thereto as to be a part thereof, and being work not connected with commerce at all.

(Signed) FREDERICK VAN NOTE.

Subscribed and sworn to before me this 17th day of September 1934.

[NOTARIAL SEAL] (Signed) WARREN FAIRBROOK,
Notary Public, New York County.

Clerk's No. 5—Register's No. 5-F-58. Commission expires March 30, 1935.

Plaintiffs' Exhibit 25

AFFIDAVIT

Filed October 11, 1934

STATE OF NEW YORK,
County of New York, ss:

L. J. TRACY, being first duly sworn, deposes and says:

That he is Controller of Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, and Los Angeles & Salt Lake Railroad Company, hereinafter referred to as Union Pacific System, four of the plaintiffs in the above-entitled cause, and has continuously been such since May 10, 1928; that as such he is in charge of the accounts of said companies and is familiar with the matters hereinafter set forth, and makes this affidavit with knowledge of the fact that it is to be used as evidence in the above-entitled cause.

The Union Pacific System companies are corporations engaged not only in the business of common carriers by railroad but in addition the said companies also to a large extent are investors in, and the owners of, stocks, bonds, and other securities of other companies, and are the owners of large numbers of parcels of real estate not used for transportation purposes, all as hereinafter more particularly set forth.

As an index to the extent of the holdings of said companies in securities of other companies, the deponent says that, as of July 31, 1934, the Union Pacific System had investments in shares of stock of other companies aggregating in excess of $103,000,000, and investments in bonds and notes of other companies aggregating in excess of $114,000,000. Of the physical properties of the said companies, on the basis of the valuations thereof as made by the Interstate Commerce Commission as of June 30, 1919, for the Union Pacific Railroad Company, June 30, 1916, for the Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, and June 30, 1914, for the Los Angeles & Salt Lake Railroad Company, brought down to December 31, 1933, by the deduction of retirements and the addition of acquirements, there are in excess of $19,000,000 thereof classified by the said Interstate Commerce Commission as noncarrier property.

Among the major items of gross earnings of the said companies for other than transportation service are the following items of revenue for the year ended June 30, 1934, to wit:

Rent of buildings and other properties	$102,000
Miscellaneous rent income	490,000
Dividend income	10,921,000
Income from funded securities	5,200,000

Deponent says that officers and employees, including Attorneys, Accountants, clerical forces, and others of the said companies, are charged with duties in connection with the investment in, attention to, accounting and financing of the investments and assets above referred to not constituting the work of interstate transportation or work so closely related thereto as to be a part thereof, and being work not connected with commerce at all.

(s) L. J. TRACY.

Subscribed and sworn to before me this 28th day of September 1934.

[SEAL]

FRANK E. TILLEY,
Notary Public, Kings County, No. 203.

Cert. filed in N. Y. Co. No. 81. Commission expires March 30, 1935.

Plaintiffs' Exhibit 26

AFFIDAVIT

Filed October 11, 1934

CITY OF WASHINGTON,
District of Columbia, ss:

WILLIAM BREIBY, being first duly sworn, deposes and says:

At the request of Counsel for plaintiffs, deponent states his qualifications and experience as an actuary as follows: That he is a member of the firm of Fackler & Breiby, Consulting Actuaries, of 8 West Fortieth Street, New York, N. Y.; a fellow of the Actuarial Society of America, by examination, and at the behest of its educational committee for three years its lecturer on pensions; an associate of the American Institute of Actuaries; a charter member and on the governing board and on the Committee on Papers of the Casualty Actuarial Society; a member of the following organizations: Fraternal Actuarial Association, New York Actuaries Club, International Congress of Actuaries, American Statistical Association, and Insurance Society of New York; author of "The Essence of Life Insurance", a textbook on the elements of life contingencies; of brochures: "Valuing a Stock Life Insurance Company", "Asset Values" and of other papers on bond amortization, insurance, and pensions; co-author with Edward B. Fackler of three substantial publications, which are considered by insurance companies and state insurance departments throughout the country as standard and used by them in their calculations of reserve liabilities and other functions in connection with life insurance, and in connection with pensions.

Deponent further says that he has done pension actuarial work for New Jersey Teachers' Association, New Jersey Teachers' Pension

and Annuity Fund, City of New York, International Telephone & Telegraph Company, Pennsylvania Railroad Company, National Broadcasting Company, and others; and has served as consulting actuary for the Insurance Departments of the States of New Jersey, Vermont, Ohio, Delaware, and of other States; and is now consulting actuary for the United States Veterans' Administration in connection with the Government Life Insurance Fund.

Deponent further states that he has been retained by and has performed actuarial service for the Association of Railway Executives for several years in connection with proposed Federal Railway Pension legislation, including the Railroad Retirement Act, and since the enactment of that Act has been retained by and has performed actuarial service for Counsel for the plaintiffs in the above-entitled suit. Deponent makes this affidavit with knowledge that it is to be filed in said cause.

1. Deponent is familiar with the allegation contained in Article III, paragraph 2, of the Bill of Complaint herein, with reference to the number of persons in the employ of plaintiffs seventy years of age or more. Deponent is informed by Julius H. Parmelee, Director of the Bureau of Railway Economics, that he is now engaged in ascertaining, from the returns being filed by the carriers with the Railroad Retirement Board, pursuant to order of that Board, the precise number of such persons. In the calculations hereinafter in this paragraph made, the deponent assumed that the number of such persons in the employ of the plaintiffs, seventy years of age and over, as of the time of the filing of the Bill of Complaint herein, is 9,972. To the extent that the exact number of such persons varies from said number of 9,972 persons the figures hereinafter stated as the annuities that will be paid to said persons during the first year and to termination of their several annuities are subject to ratable adjustment, and when so adjusted will be approximately correct. In the calculations hereinafter in this paragraph made, the deponent also assumes that the average annual annuity payable to such persons under the provisions of the Railroad Retirement Act will be approximately $972 per person. This assumption is based upon an analysis made by the deponent of the wage statistics of four representative large carriers, which statistics were reconciled with the aggregate pay rolls of the Class I carriers, and upon prior service statistics of 129 Class I carriers assembled in 1932 and referred to in affidavit of said Parmelee filed herein. To the extent that the exact amount of the average of such annuities varies from the said average sum of $972, the figures hereinafter stated as the aggregate of such annuities that will be paid to said persons during the first year and to termination of their several annuities are subject to ratable adjustment, and when so adjusted will be approximately correct. On said assumptions, the aggregate amount that will be paid in annuities to said persons during the first year will be approximately $9,339,000, and to the termination of their several annuities the aggregate sum that will be paid to the said persons will be approximately $75,879,000. These figures of first-year annuities and aggregate annuities to maturity are based on established actuarial principles, including the application of recognized tables of mortality, on the basis of the respective ages of seventy years and over of the said persons, and on the basis of the

varying amounts of annuities in the several ages brackets included therein.

The foregoing assumptions of 9,972 for the number of employees, and $972 as the average annuity, were based on such statistics as were available to the deponent at the time the calculations were made.

2. The deponent was also requested to ascertain what aggregate amounts would represent that portion of the annuities of persons in the employ of plaintiffs on June 27, 1934, which relates to and is based upon their service rendered prior to the approval of the Railroad Retirement Act, expressly excluding from said computations all service rendered subsequent to the approval of the Act. In the making of these computations, the deponent had access to and availed himself of statistics of 129 Class I rail carriers assembled in the latter part of the year 1932, under the direction of Julius H. Parmelee, Director of the Bureau of Railway Economics, for use, among other things, in hearings before Congressional Committees upon pending railway pension legislation. This compilation of data, which includes, among other things, detailed information as to the numbers of railway employees, their respective ages, and their length of service with the individual carriers by whom they were then employed, is on file in this suit, as Exhibit "A", with the affidavit of said Parmelee, verified September 17, 1934, and is referred to as a part of this affidavit. The deponent has brought these statistics down to date by applying thereto appropriate mortality, disability, and withdrawal from service factors, so as to reflect the conditions as of July 1934 in the case of the said 129 carriers. These results were then adjusted and supplemented, for the purpose of covering all the Class I railroads, by reference to and use of the number of employees, as of July 1934, of all Class I railroads, obtained from the reports of the Interstate Commerce Commission. This was further adjusted by adding the employees of the Pullman Company and the two Express Companies, plaintiffs herein, and the calculation was then made as to the totals, thus representing all the plaintiffs. Deponent further says that said data constituted a sufficient basis for the ascertainment of the results hereinafter set forth.

To the data so developed, the deponent has applied appropriate rates of mortality, and upon the basis thereof he finds and states that approximately 774,173 of the aggregate number of employees of all the plaintiffs as of July 1934 will survive to age 65, or are now 65 years of age or older; and that if all of said persons retire, under the provisions of the Railroad Retirement Act, upon attaining age 65, or on February 1, 1935, if then 65 years of age or older, there will accrue to them in annuities, in respect only of service rendered prior to the date of the approval of the Act, and not including any portion of annuities payable to them in respect of services rendered subsequent to the approval of the Act, an aggregate or gross sum of approximately $5,005,000,000.

By similar process, deponent finds and states that approximately 60[illegible]225 of said aggregate number of employees will survive to age 70, or are now 70 years of age or older, and that if all of said persons retire under the provisions of said Act upon attaining age 70, or on February 1, 1935, if then 70 years of age or older, there will accrue

to them in annuities, in respect only of service rendered prior to the approval of the Act, and not including any portions of annuities payable to them in respect of services rendered subsequent to the approval of the Act, an aggregate or gross sum of $3,120,000,000.

The foregoing figures do not include, nor make any allowance for any annuities that may accrue to persons not in the service of the carriers at the time of the approval of the Act but who may have been in the service of the carriers at times in the past and who may hereafter reenter carrier service and thereby secure credit for such past service, and do not include any prior service of such persons with carriers other than the particular carriers by whom such persons were employed at the time of the approval of the Act.

(Signed) WILLIAM BREIBY.

Subscribed and sworn to before me this 17th day of September 1934.

[SEAL] (Signed) P. K. HOWARD,
Notary Public.

Plaintiffs' Exhibit 27

AFFIDAVIT

DISTRICT OF COLUMBIA,
City of Washington, ss:

JULIUS H. PARMELEE, being first duly sworn, deposes and says:

Affiant is the same Julius H. Parmelee who has made previous affidavits in this cause. He makes this affidavit with knowledge that it is to be used in evidence in this cause, and after having read and studied the affidavits filed herein by defendants.

I

Comparative Superannuation in Railway and Other Industries

Three of the affidavits filed in this cause by defendants lay stress on what is denoted the "excessive" superannuation of employees in the railway industry compared with other industries.

Definition of "superannuation"

The affidavit verified by Murray W. Latimer on October 2, 1934, page 28, states that a considerable portion of the industrial pension plans "provide for the compulsory retirement of employees at age 65, regarding that age as the point marking off the superannuated from the body of employees whose services may be utilized with full advantage."

Extent of superannuation

Said Latimer affidavit, page 18, states: "* * * the railway industry, although more extensively covered by voluntary pension plans than any other single industry in the United States, nevertheless has a larger proportion of aged employees than any other * * *"

The affidavit verified by Otto S. Beyer on October 2, 1934, page 2, after describing a comprehensive survey of the employment histo-

ries of a large representative sample of railroad employees, launched by him with the approval of the Federal Coordinator of Transportation, states: "The results of this survey definitely confirm the common belief as to the extent to which superannuation prevails among railroad employees when compared with the employees of other industries or with the employees of industry in general * * *."

The affidavit verified by Joseph B. Eastman on October 2, 1934, page 3, after describing the seniority rule in effect in the railroad industry, states: "Because of these facts, the superannuation among railroad employees is probably much in excess of that existing in industry generally."

Said Eastman affidavit, page 3, twice again refers to "this excessive superannuation" and "the existing excessive superannuation", clearly referring to the situation in the railway industry compared with industry in general.

Said Latimer affidavit, pages 28–29, again commenting on superannuation of railway employees, states that compared with "a number of heavy industries, the proportion of persons 65 and over in the railroad industry seems heavy." The affidavit then cites the census of April 1, 1930, as showing that 3.43 percent of steam railroad employees were 65 or over, compared with smaller percentages in coal mining, oil wells, chemical industry, iron and steel, transportation other than railroads, and building-trade laborers; and compared with larger percentages in trade, leather, clothing, and in parts of the building industry.

Census of occupations, 1930

The census of April 1, 1930, referred to in said Latimer affidavit, page 28, is evidently the census of occupations of persons gainfully occupied in the United States, which was one phase of the decennial census taken on that date by the Bureau of the Census, United States Department of Commerce. The result of that census of occupations has been published by the Bureau of the Census, in considerable detail, in a report issued as Volume V of the Population Report of 1930, and entitled "General Report on Occupations." The following page references are to this official government report.

Table 1, page 114, of the Report is a summary of gainful workers in the United States on April 1, 1930, classified by sex and age. Calculations derived from this table show that on that date a total of 38,077,804 males were gainfully occupied, of whom 1,938,749, or 5.09 percent, were 65 years of age or over; that 10,752,116 females were gainfully occupied on that date, of whom 266,218, or 2.48 percent, were 65 years of age or over; that the total number of male and female gainful workers on that date was 48,829,920, of whom 2,204,967, or 4.52 percent, were 65 years of age or over.

Table 3, page 116, of the Report is an age classification of gainful workers in the United States on April 1, 1930, both male and female, according to ten general divisions and occupations. The total number reported under each division, and the percentage reported as 65 years of age or over, calculated from that table, are as follows:

	Total number	Percentage 65 years or over
All divisions	48,829,920	4.52
Mfg. & Mech. industries	14,110,052	3.68
Agriculture	10,471,988	7.93
Trade	6,081,407	4.07
Domestic and personal service	4,952,451	4.70
Clerical occupations	4,025,324	1.42
Transportation & communication	3,843,147	2.61
Professional service	3,253,884	3.48
Extraction of minerals	984,323	2.49
Public service (not elsewhere classified)	856,305	8.11
Forestry & fishing	250,469	4.44

Seven of these ten general divisions of occupations are reported by the Bureau of the Census as having a larger proportion of persons 65 years of age or over than 3.43 percent, which according to said Latimer affidavit, page 28, is the corresponding proportion for employees in the railroad industry. In the case of two of the seven divisions, namely, agriculture and public service, the proportions are more than twice as great as in the case of steam railroads. These seven divisions contained 81.9 percent of all gainfully occupied persons in the United States, and included the two largest divisions, namely, the manufacturing and mechanical industries and agriculture.

Of the three general divisions with smaller proportions than 3.43 percent, one is that of transportation and communications, of which the steam railroads are a part. One is extraction of minerals, a comparatively small division covering only 2.0 percent of the total of gainful workers. One is clerical occupations; the total of 4,025,324 in this division are separated into 2,038,494 males and 1,986,830 females, and whereas the proportion of the total division is only 1.42 percent, the corresponding proportions for the two sexes in the division are 2.54 percent for the males and 0.28 percent for the females.

There follow the proportions of gainful workers reported on April 1, 1930, as 65 years of age or over, within a number of specified occupations, all of which contained more than 100,000 persons on that date, and some of which are clearly of the type of work referred to in said Latimer affidavit as "heavy industries." The following totals and percentages are derived and calculated from Table 6, pages 118–137, of the Report of the Bureau of the Census already described.

Occupation	Total number	Percentage 65 years or over
Farm laborers	4,392,784	3.43
Blacksmiths, forgemen and hammermen	147,469	9.05
Brick and stone masons and tile layers	170,903	6.01
Carpenters	929,425	8.02
Engineers (stationary), hoistmen, cranemen, etc	316,964	4.37
Firemen (excluding locomotive and fire department)	127,294	4.12
Painters, glaziers, etc	528,951	5.00
Laborers, lumber and furniture industries	177,457	4.58
Draymen, teamsters and carriage drivers	111,224	7.00
Laborers, road and street	307,027	4.88
Laborers in coal and lumber yards, warehouses, etc	113,689	4.17
Retail dealers	1,703,522	6.49
Laborers, public service	157,010	8.23

These 14 specified occupations, totaling 10,299,327 persons gainfully occupied on April 1, 1930, were reported by the Bureau of the Census as having proportions 65 years of age or over as great as, or greater than, and in some cases several times greater than, the 3.43 percent of steam railroad workers which was given in said Latimer affidavit, page 28.

Thus, it appears that superannuation (using the term as defined in defendants' affidavits to mean employees 65 years of age or over) in the railroad industry is not greater than, but is actually less than, that in industry generally. And it is substantially less than in a number of the general occupational divisions and substantially less than in many of the specific occupations in both heavy and light industries.

II

Cost of Annuities Under Railroad Retirement Act

The affidavit filed on behalf of defendants in this cause verified by Charles E. Brooks on October 3, 1934, page 5, submits a table of estimated annuity payments under the Railroad Retirement Act for the 10 calendar years 1935 through 1944. These annuity payments are exclusive of death benefits, which said affidavit states will not exceed an aggregate of $8,000,000 in the tenth year, namely, 1944. They also exclude the annual cost of administration of the retirement fund set up by the act, including salaries and expenses of the members of the Retirement Board and its employees.

It has been calculated, in the pleadings and proofs of both plaintiffs and defendants, on the basis of the total carrier pay roll in 1934, that the aggregate employee and employer contribution to the retirement fund will be approximately $90,000,000 per year. On the assumption that the aggregate contribution will remain the same, or nearly so, during the period of ten years covered by the Brooks table, the fund will contain a surplus during the first four of the ten years; this surplus will then decline and be replaced by a deficiency during the next four years; the deficiency will increase rapidly during the remaining two years of the ten-year period, the aggregate deficiency (without allowance for death benefits or for costs of administration) at the end of the tenth year being $97,086,000.

These results appear in the following table. The first column of the table shows the expected contribution during each of the ten years to the retirement fund. The second column, derived from the Brooks table, shows the expected annuity payment during each of the ten years. The third column is the difference between the first and second columns and shows the expected surplus or deficiency for each of the ten years. The fourth column shows the cumulative surplus or deficiency from the beginning of the period to the end of the first, second, and so on up to the tenth year:

Year	Contribution	Annuity payment	Surplus (S) or Deficiency (D)	
			Year	Cumulative
1935	$90,000,000	$64,353,000	S 25,647,000	S 25,647,000
1936	90,000,000	71,003,000	S 18,997,000	S 44,644,000
1937	90,000,000	79,511,000	S 10,489,000	S 55,133,000
1938	90,000,000	87,093,000	S 2,907,000	S 58,040,000
1939	90,000,000	94,991,000	D 4,991,000	S 53,049,000
1940	90,000,000	103,021,000	D 13,021,000	S 40,028,000
1941	90,000,000	111,861,000	D 21,861,000	S 18,167,000
1942	90,000,000	119,413,000	D 29,413,000	D 11,246,000
1943	90,000,000	128,358,000	D 38,358,000	D 49,604,000
1944	90,000,000	137,482,000	D 47,482,000	D 97,086,000
Ten-year total	900,000,000	997,086,000		D 97,086,000

Thus the cumulative deficiency of the retirement fund after ten years, based upon the figures shown in the Brooks affidavit, will be not less than $97,086,000, to which should be added unknown amounts representing, first, the cost of administration of the retirement fund, and second, repayments to employee contributors out of the fund on account of death benefits.

This shows that the fund will become insolvent in 1942, only the eighth year of its existence, and will become increasingly insolvent thereafter if the percentages of contribution tentatively fixed in the act are preserved. It results that to maintain the fund in a solvent condition it will be necessary for the Retirement Board, not later than the eighth year, to exercise the power given it by the Act to increase the percentages of contributions of employees and carriers.

As stated, the annuity payments appearing in the foregoing tabulation are the estimates of such payments set out in the Brooks affidavit. Affiant did not in the foregoing table calculate interest on the years showing surplus nor offset by loss of interest in the years showing deficiency. In any event, the item of interest would be much more than offset by the costs of administering the Act and the death benefits.

III

Numbers of employees of class I railroads who have left railroad service within the year July 1, 1933, to July 1, 1934, and have not returned to such service, other than those removed by death

In affiant's affidavit in this cause, dated September 22, 1934, on page 7, affiant supplemented his second original affidavit showing responses to two questionnaires and, as to the second of those questionnaires, showed that as of that date 130 of the plaintiffs had sent in to affiant returns, supported in each case by affidavits, showing a total of 146,703 employees left carrier service within the year July 1, 1933, to July 1, 1934, other than those removed by death, and have not returned; and that, in the expressed best judgment of the reporting officers of said 130 plaintiffs, a total of 86,485 of those 146,703 would not return to service of said carriers but had permanently left said service.

In order to obtain more complete information as to the factual basis for the expressed opinion as to the 86,485 who would not return to service, affiant again sent out to all plaintiffs a circular letter dated September 15, 1934, calling for more detailed information as to the reasons for the leaving service of those reported, such additional report to be supported by affidavit of the reporting officer. A copy of said letter of September 15, 1934, is hereto attached as Exhibit A.

Affiant states that as of the date of the present affidavit he has received responses to his letter of September 15, 1934, supported in each case by affidavit, from 127 of the plaintiffs. Such reports of 111 of the plaintiffs gave a distribution of causes as called for by the letter. The other 16 gave merely general statements as to causes, and hence are not included in the following table. However, the 111 which made distribution of causes represent 95% of all the employees reported by the 130 plaintiffs, that is 95% of the total 86,485. The said affidavit reports of the 111 such plaintiffs show the causes of leaving service of those previously reported under divisions as follows:

Cause of leaving service	Number	Percent of total
1. Discharged for cause	8,085	9.9
2. Resigned	16,033	19.6
3. Retired on account of age or disability, with or without pension	5,066	6.2
4. Necessary force reductions	17,538	21.4
5. Temporary employment, work completed	19,786	24.2
6. Position abolished	167	0.2
7. Consolidation of forces	5,512	6.7
8. Left service to engage in other employment (practically the same as resignation, but reported in different terms)	5,125	6.3
9. Floaters, seasonal labor lost track of when left	2,845	3.5
10. Completed apprenticeship	95	0.1
11. Died (a few plaintiffs failed to note the exclusion "other than those removed by death")	64	0.1
12. All others	1,470	1.8
Total	81,786	100.0

JULIUS H. PARMELEE,
(Affiant)
Director Bureau of Railway Economics, Washington D. C.

Subscribed and sworn to before me this 6th day of October 1934.

[SEAL] MARY T. KINNEY,
Notary Public.

My commission expires October 3, 1938.

Plaintiffs' Exhibit 28

AFFIDAVIT

Filed October 11, 1934

STATE OF NEW YORK,
County of New York, ss:

EDGAR J. MCCLEES, being first duly sworn, deposes and says:

That he is Secretary and in charge of the Bureau of Information of the Eastern Railways, which is an association maintained by the

Class I railroad carriers operating in the so-called Eastern Territory, that is to say, approximately all carriers operating in the United States and located north of the Potomac River and east of Chicago, Illinois; that the said railroads employ approximately 450,000 persons, which number is approximately 43% of the employes of all Class I carriers of the United States; that the said Bureau deals primarily with matters relating to wages and working conditions of railway employes; that the deponent has been employed in the said Bureau for over twenty years, and since 1922 has been in direct charge thereof; that, in the course of his duties as aforesaid, deponent has kept himself informed with respect to personnel conditions on the railroads, not only in the Eastern Territory but as well in respect of such conditions on railroads operating throughout the United States. This familiarity with said conditions has been brought about, among other things, by the constant dissemination of information circularized by the deponent's Bureau among the railroads members thereof; the assembly and analysis of statistical and other data furnished by the individual carriers similarly dealt with; the preparation for and participation by the deponent in arbitrations between the several organizations of railroad employes and individual carriers or groups thereof; and through correspondence and conferences with railroad officers and others, all thereof having continuously been the work of the deponent during the past twenty years.

Deponent avers that there are more than 1,000,000 persons who were in carrier service prior to June 27, 1933, who have not been in carrier service subsequent to said June 27, 1933, as alleged in Article VI, paragraph 2, of the Bill of Complaint herein. In support of this averment, the deponent avers that in the month of August 1920 there were in the service of the Class I carriers of the United States, as shown by the official reports of the Interstate Commerce Commission, 2,197,824 persons; that in June 1927, as shown by said reports, there were 1,821,490 persons so employed; in June 1933 there were 972,813 persons so employed; and in June 1934, 1,070,837 persons so employed. In the making of force reductions, it is the prevailing practice of the carriers of the United States to let out of service employes with the briefest service records, which, in a general way, results in the letting out of the youngest employes first. In addition to force reductions, indicated by the foregoing, there has always prevailed a substantial so-called "turnover" in personnel on the railroads, resulting from voluntary resignations, seasonal or temporary employment, completion of large construction projects, and discharges for cause. During former periods of greater industrial prosperity this "turnover" was heavy, because of resignations to engage in other lines of employment.

Deponent avers that it has been the prevailing practice of the carriers for many years, as forces are enlarged or as vacancies are filled, to give the preference to former employes of such individual carriers, and by reason of this practice, the deponent avers that no substantial or significant number of persons separated from the employ of any of the carriers prior to June 27, 1933, nor so separated prior to June 27, 1934, have been employed by other carriers since June 27, 1933.

Deponent says that the foregoing averment, that more than 1,000,000 persons in carrier service prior to but not since June 27, 1933, is extremely moderate and makes adequate allowance for all elements, including actuarial survivorship of such persons.

[NOTARIAL SEAL] (Sgd.) EDGAR J. MCCLEES.

Subscribed and sworn to before me this 7th day of Sept. 1934.

CHARLES MCLERNON,
Notary Public.

Notary Public, Nassau County. Certificate filed in New York County. N. Y. Co. Clk's No. 158, Reg. No. 5Mc128. Commission Expires March 30, 1935.

Plaintiffs' Exhibit 29

AFFIDAVIT

Filed October 11, 1934

STATE OF GEORGIA,
County of Fulton, City of Atlanta, ss:

J. E. TILFORD, being first duly sworn, deposes and says:

That he is and has been for a number of years Chairman of the Southern Freight Association. The Southern Freight Association is a voluntary Association composed of a majority of the railroads operating in southern territory (that is, territory east of the Mississippi River and south of the Ohio and Potomac Rivers), with headquarters at Atlanta, Ga. Further, that by virtue of such position as Chairman of the Southern Freight Association, as well as previous positions which deponent has held with railroads in southern territory, he is familiar with the rates in general of such railroads intraterritorially in southern territory and interterritorially between southern territory and other sections of the United States. Affiant has offices at 101 Marietta Street, Atlanta, Georgia.

Affiant further states that by virtue of his position as Chairman of the Southern Freight Association he is a member of a Committee of railroad officials appointed by the Presidents or Chief Executive Officers of Class I Railroads in the United States for the purpose of recommending ways and means of increasing the revenues of the railroads to meet the increased costs of labor, materials, and supplies. The said Committee met and organized in Washington, D. C., on June 15th, 1934, and the traffic officials of said Committee have given the subject practically constant study and consideration since that time.

Affiant further states that the estimated increase in the cost of operation of Class I Railroads in the United States is more than $293,000,000.00 per annum, representing the increased level of wages of railway labor and the increased unit prices of railroad materials and supplies. Further, that this estimate does not include any sum to meet the contributions required by the Railroad Retirement Act.

Affiant further states that after careful study and consideration the aforesaid committee recommended increases in freight rates and

charges which, it is estimated, will yield Class I Railroads in the United States $170,000,000.00 per annum, or approximately 60 percent of the amount needed to meet the increased operating costs. As the result of this recommendation the railroads have filed a petition with the Interstate Commerce Commission seeking authority to make such increases effective, the proceeding having been docketed as Ex Parte 115 and entitled Increases in Freight Rates and Charges, 1934.

Affiant further states that it was the judgment of the aforesaid committee, and it was and is his judgment, that it would be unwise and unprofitable to increase the freight rates and charges more than the aforesaid amount, mainly because increases of a greater amount would cause diversions of freight to other modes of transportation such as highway carriers, water carriers, and pipe lines, and in sufficient quantity to substantially offset the increased revenue which would be obtained on the remaining traffic.

Affiant further states that it was the judgment of the aforesaid committee, and it was and is his judgment, that because of the aforesaid competition with other modes of transportation and because of the continuing business depression it is impossible for the railroads to obtain an increased volume of traffic to yield sufficient revenue to meet the increased operating costs.

Affiant further states that since the aforesaid committee was unable to recommend a sufficient increase in freight rates and charges to cover the increase in costs of labor, materials, and supplies, it is manifest the railroads cannot make further increases in such freight rates and charges to meet the contributions required by the Railroad Retirement Act.

And Affiant further states that the petition to the Interstate Commerce Commission, referred to above, justifies the request for authority to increase rates and charges only on the estimated annual total of additional expenses of $293,000,000 imposed upon the Class I carriers as a result of the increased payments to labor and the increased costs of materials and supplies. Affiant is of the opinion, based upon his knowledge and experience and his special study of the question, that the estimates of increased payments to labor and the increased costs of materials and supplies are correct, and that even though the Interstate Commerce Commission should authorize, as petitioned, the increases in freight rates and charges, and even though the increases should produce the estimated maximum of $170,000,000 per annum additional freight revenues, such increases in freight revenues would still be insufficient, by $123,000,000 per annum, to meet the increased costs of labor, materials, and supplies. And affiant further states that said petition to the Commission makes no mention of the additional increase in operating expenses of the carriers which will be inflicted by the additional burden of contributions by the carriers to the fund provided for under the Railroad Retirement Act, which is estimated to amount to at least $60,000,000 for the first year of operation under the Act for all Class I carriers.

Accordingly, affiant states it as his opinion that it is impossible for the Class I carriers of the United States to obtain in any way additional revenues sufficient to carry the burden imposed by the

Railroad Retirement Act, either by increases of rates, or by increase in traffic volume, or otherwise.

J. E. TILFORD,
(Signature)
Chairman Southern Freight Assn.,
(Title)
101 Marietta St., Atlanta, Ga.
(Address)

Subscribed and sworn to before me this 12th day of September 1934.

[SEAL]

H. C. SHOVER,
Notary Public.

My Commission expires Nov. 15, 1934.

Plaintiffs' Exhibit 30

AFFIDAVIT

Filed October 11, 1934

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

E. B. BOYD, being first duly sworn, deposes and says:

That he is now, and has for some years been, Chairman of the Western Traffic Executive Committee, and Chairman of the Western Trunk Line Committee, representing steam railway carriers in Western territory; that he has had over forty (40) years of railway experience in various positions in the Traffic Department from clerk to assistant to Vice President; Chairman of the Western Traffic Executive Committee, an organization of the chief traffic officers of railroads in what is known as Western Classification territory; also Chairman of the Western Trunk Line Committee, an organization of the chief traffic officers and traffic departments of railways in states east of the Rocky Mountains and north of the Oklahoma line in Western Classification territory, and is familiar with the conditions prevailing in Western territory, with respect to truck and water competition.

That he was a member of the special traffic committee that drafted recommendations for advances in railway freight rates, which were incorporated in a petition filed on August 27, 1934, with the Interstate Commerce Commission, docketed as Ex Parte 115.

Affiant has read the affidavit in this cause of D. T. Lawrence, the chairman of said committee, and knows the contents thereof. Affiant states that to the best of his knowledge and belief the statements of fact contained in said affidavit are true, and that affiant's opinion concurs fully with all of the opinions set forth in said affidavit.

(S.) E. B. BOYD,
(Signature)
Chairman of Associations named on first page,
(Title)
410 Union Station, Chicago, Ill.
(Address)

Subscribed and sworn to before me this 15th day of September 1934.

[SEAL]

(S.) J. J. BALTAZORE,
Notary Public.

My Commission expires August 4, 1937.

Plaintiffs' Exhibit 31

AFFIDAVIT

Filed October 11, 1934

STATE OF NEW YORK,
County of New York, City of New York, ss:

D. T. LAWRENCE, being first duly sworn, deposes and says:

That he has served individual eastern railroads and organizations of eastern railroads for the past forty-four years, being engaged throughout all of that time in traffic department work. That work has pertained to the making of rates and classification and also to the fostering of traffic and to the general relations of the traffic departments of the railroads in the eastern territory with the public. At the present time affiant is Chairman of the Trunk Line Association, an organization of the traffic departments of the Class I carriers in what is known as "Trunk Line Territory," which Association is a clearing house or forum for investigation and discussion of traffic matters of common interest. Affiant is also Chairman of the Traffic Executive Association—Eastern Territory, an organization of the traffic executives of substantially all of the Class I carriers operating in what is known as "Eastern Territory." This Association is likewise a forum or clearing house for investigation and discussion of traffic problems by these executives. Affiant is also Chairman of the Presidents' Traffic Conference—Eastern Territory, which is a similar organization composed of presidents of Class I railroads operating in Eastern Territory for consideration of traffic matters of exceptional importance or which are appealed by the traffic executives to the chief executives for consideration. Affiant is also Chairman of the Traffic Division of the American Railway Association. Affiant has offices at 143 Liberty Street, New York City.

The Advisory Committee of the Association of Railway Executives early in the summer of 1934 appointed a committee, consisting of twenty-four members, including one president, three lawyers, and three traffic executives of individual important railroads, and the Chairman of the Traffic Executive organization in each of the three territories. Later the personnel of the committee was augmented by the addition of an extra traffic representative for each of the Western and Eastern regions and by the addition of law representatives for each of the three regions. The committee as constituted then consisted of twenty-nine members. This committee, the Advisory Committee of the Association of Railway Executives, directed to study the freight traffic of the country and prepare a recommendation as to a method for increasing freight rates and charges which would produce as nearly as may be an estimated sum computed as approximately $359,000,000, representing increased expenses due to restoration of ten percent deduction from remuneration which had been previously voluntarily accepted by labor; also increased cost of materials and supplies used by the railroads in operation of their properties, which increased cost had been due in chief, at least, to the activities of the Government under the National Industrial Recovery Act; also contribution expected from the railroads in consequence of the Federal Railroad Pension Act.

The traffic department representatives on this committee were constituted as a traffic subcommittee. This traffic subcommittee, consisting at first of twelve and later of fourteen members, elected the affiant as its Chairman and made the directed investigation and study by protracted conference among themselves and with the traffic executives and representatives of many other railroads. In its deliberations, which consumed substantially twenty-three actual working days, this traffic subcommittee considered with great care what traffic might reasonably be made subject to increased charges for rail transportation, with minimum diversion of traffic to transportation agencies other than the railroads or restriction by other means of the volume of traffic to be moved by rail. The result of this study was a recommendation which was finally approved and included in a petition for permission to effect increases in railway freight charges filed with the Interstate Commerce Commission on August 27, 1934. This petition of Class I railroads for authority to increase freight rates and charges filed with the Interstate Commerce Commission has been docketed as Ex Parte No. 115 and entitled Increases in Freight Rates and Charges, 1934.

The best estimate of the makers of this proposal is that in actual practice, based upon prospective movement of traffic for the year 1935, the resulting increase in charges, if authorized by the Interstate Commerce Commission, would be approximately $170,000,000 per annum for all Class I railroads in the United States. Based upon affiant's experience, knowledge, study of the particular question, and best judgment, he is of the opinion that this estimate is as nearly correct as can be made. It is the opinion and belief of the traffic subcommittee, based upon long experience and careful study, and affiant asserts that it is his own opinion, based upon his experience, his special study of the question, his knowledge of traffic, and his best judgment, that by reason of competitive conditions the competition of motor carriers, water carriers, and other competing transportation agencies, it is impossible at this time and under existing conditions for the Class I rail carriers of the United States to so increase their freight rates and charges or to so increase the volume of their freight traffic as to produce an increase in freight revenues in excess of this estimated $170,000,000 per annum.

And affiant further shows that the petition to the Interstate Commerce Commission, above referred to, predicates the prayer for authority to increase rates and charges only on the increased payments to labor and the increased costs of materials and supplies and shows the estimated annual total of additional operating expenses imposed upon the Class I carriers as the result only of the increased costs of labor, materials, and supplies as being $293,000,000 per annum. Based upon his knowledge and experience and his special study of the question affiant is of the opinion that these estimates are correct and that accordingly even if the Interstate Commerce Commission authorizes the petitioned increase in freight rates and charges, and even if such increase should produce the estimated $170,000,000 per annum increase in freight revenues, such increase in freight revenues would still lack by $123,000,000 per annum being sufficient to cover only the increased costs of labor, materials, and supplies. And affiant shows that no mention is made in the said

petition of the additional increase to operating expenses of the carriers which will be caused by the burden of contributions by the carriers to the fund provided for under the Railroad Retirement Act, estimated to amount to at least $60,000,000 for the first year for all Class I carriers.

Accordingly affiant states that in his opinion it is entirely impossible for the Class I carriers of the United States in any way to obtain additional revenues sufficient to take care of the burdens to be imposed by the Railroad Retirement Act, either by increases of rates or by increase in the volume of traffic handled or in any other way.

D. T. LAWRENCE,
(Signature)

Chairman, 143 Liberty St., New York, N. Y.
(Title) (Address)

Subscribed and sworn to before me this 11th day of September.

[SEAL] EDWARD J. HALL,
Notary Public.

My Commission expires March 30, 1935. Notary Public, N. Y. Co., No. 27, Reg. No. 5-H-191.

Plaintiffs' Exhibit 32

AFFIDAVIT OF CLARENCE A. MILLER

Filed October 11, 1934

DISTRICT OF COLUMBIA, *ss:*

The undersigned, CLARENCE A. MILLER, General Counsel, The American Short Line Railroad Association, being first duly sworn, deposes and says that he has prepared the annexed statements showing the lines of railroad abandoned, upon authorization of the Interstate Commerce Commission, from the effective date of section 1 (18)-(22), May 28, 1920, to September 15, 1934; and the lines of railroad abandoned, upon authorization of the Interstate Commerce Commission, since June 27, 1933; that the said statements have been carefully prepared from the official reports and records of the Interstate Commerce Commission, said reports and records having been personally examined by him, the sources of said statements being shown thereon; that he is duly authorized by The American Short Line Railroad Association to prepare said statements and to make this affidavit, and that he makes said affidavit with the knowledge and intent that it shall be used in evidence in the trial of the above-entitled cause, or any hearing that may be held therein.

CLARENCE A. MILLER,
General Counsel,
The American Short Line Railroad Association,
401 Union Trust Building,
740 15th Street N. W., Washington, D. C.

Subscribed and sworn to before me this 17th day of September 1934.

[SEAL] MARY T. KINNEY,
Notary Public, D. C.

My commission expires October 3, 1938.

List of railroads abandoned, upon authority of Interstate Commerce Commission, 1921–1934

[September 15, 1934]

Name of Road	Finance Docket	I. C. C. Reports		Mileage
		Volume	Page	
Addison Railroad Company	2481	79	427	1.68
Ahukini Terminal & Ry. Co., Ltd	10366	199	579	19.4
Alabama & Mississippi Railroad Co	59	70	531	77.75
Alabama & Northwestern Railroad Co	10309	202	4	22.0
Alexandria & Western Railway Company	4297	94	742	20.65
Andalusia, Florida & Gulf Ry. Co	4755	99	518	25.5
Arizona Southern Railroad Company	10110	193	577	21.0
Barnegat Railroad Company	2590	79	506	8.12
Batesville Southwestern R. R. Co., et al	8227	170	289	16.93
Black Hills & Fort Pierre R. R. Co	7910	158	432	41.86
Blytheville, Burdette & Mississippi River Ry. Co	3275	86	159	7.0
Bonlee & Western Railway Company	6999 9010	145 180	376 724	89.37
Brimstone Railroad & Canal Company	7307	170	205	6.64
Bristol Railroad Company	7980	158	704	6.14
Brooksville & Ohio River R. R. Co	8774	175	108	10.0
Brownwood North & South Ry. Co	4295	105	729	17.65
Buffalo, Bradford & Kane R. R. Co	8818	175	565	.89
Bullfrog, Goldfield Railroad Co	6389	131	513	78.95
Burro Mountain R. R. Co	9876	193	758	13.07
Cache Valley Railroad Company	5927	117	676	9.6
California, Arizona & Santa Fe Ry. Co	10156	193	656	10.35
Caney Valley Railway Company	9946	193	262	12.81
Carolina Railroad Company	8606	175	248	13.26
Carolina & Northeastern Railway Co	10344	199	353	8.14
Carthage & Pinehurst Railroad Co	1520	70	774	12.22
Cement, Tolenas & Tidewater R. R. Co	8028	168	280	1.9
Central New York Southern R. R. Corp	2722	86	830	37.0
Central Railway Company of Arkansas	8546	175	55	6.92
Chester Railroad Co	9890	193	737	6.3
Chester & Becket Railroad Company	8995	176	643	5.0
Chicago, Harvard & Geneva Lake Ry. Co	9141	184	19	2.54
Chicago, Peoria & St. Louis R. R. Co	2703	76	801	234.32
Chicago, St. Louis & New Orleans R. R	7436	150	782	16.38
Cimarron & Northwestern Railway Co	8317	166	391	7.5
Colfax Northern Railway Company	8343	105	807	5.93
Dallas, Cleburne & Southwestern Ry. Co	4761	99	279	9.82
Dayton, Toledo & Chicago Ry. Co	2589	76	395	90.0
Deadwood Central Railroad Company	6118	124	259	6.98
Death Valley Railroad Co., Ltd	8602	170	325	20.35
Delta Southern Railway	1500	70	546	52.11
Denison, Bonham & New Orleans R. R. Co	7327	154	138	24.15
Detroit, Bay City & Western R. R. Co	3171	94	666	98.0
Detroit, Toledo & Milwaukee R. R. Co	9034	184	706	88.81
Dover & South Bound Railroad Co	8379	170	69	24.268
Duluth & Northern Minnesota Ry. Co	1258	70	184	99.25
Eastern Texas Railroad Company	4	65	436	30.3
East Kentucky Southern Railway Co	9520	189	230	13.0
East Texas & Gulf Railway Co	10173	199	125	9.6
Elberton & Eastern Railroad Co	10141	199	76	34.62
Elkin & Alleghany Railroad Co	8888	175	653	15.2
Elwood, Anderson & Lapelle R. R. Co	7297	150	468	1.412
Eriton Railroad Company	10098	193	633	.869
Fairchild & North-Eastern Railway	7483	158	144	23.52
Florida, Central & Gulf Railway	8091	170	75	29.54
Franklin & Pittsylvania Railway Co	9590	199	203	21.0
Fresno Valley Railroad Company	4455	94	485	25.0
Gainesville & Northwestern R. R. Co	8665	175	647	35.56
Garyville Northern Railroad Company	8965	184	367	35.0
Glady & Alpena Railroad Company	2421	76	73	18.0
Glenmora & Western Railway Company	3552	90	105	17.0
Groveton, Lufkin & Northern Ry. Co	8629	175	547	36.0
Gulf Ports Terminal Railway Company	5179	111	597	42.72
Halite & Northern Railroad Co	10227	199	271	3.197
Hancock & Calumet Railroad Company	5727	117	123	2.0
Hartford Eastern Railway Company	9574	189	789	42.0
Hawkinsville & Florida Southern Ry. Co	1451	70	506	92.27
Helm & Northwestern Railroad Company	8098	170	33	12.5
Kalamazoo, Lake Shore & Chicago Ry. Co	3367	90	188	16.0
Kane Railroad Company	8818	175	565	.34
Kankakee & Seneca Railroad Company	9674	189	583	42.19
Kansas City, Excelsior Springs & Northern Ry. Co	9790	193	407	8.72
Kanal Railway Company	10186	193	772	4.98
Kayderosa Railroad Corporation	7855	162	894	12.0
Keating & Smethport Railroad Company	8818	175	565	.12

List of railroads abandoned, upon authority of Interstate Commerce Commission, 1921–1934—Continued

Name of Road	Finance Docket	I. C. C. Reports		Mileage
		Volume	Page	
Kentworth & Helper Railroad Company	5323	105	719	3.75
Kentwood & Eastern Railway Company	2641	70	319	16.53
Kentwood, Greensburg & Southwestern R. R.	1308	70	201	13.21
Kinder & Northwestern Railroad Co	6387	131	87	2.0
Kinston Carolina Railroad Company	7175	154	35	31.0m6
Klickitat Log & Lumber Company	7071	148	803	16.0
Knox Railroad Company	9555	187	387	8.0
Kootaz Railway Company, Limited	9016	180	202	11.2
Kosciusko & Southeastern R. R. Co	9001	180	45	16.3
LaCrosse & Southeastern Railway Co	9845	180	785	65.43
L'Anguille River Railway Company	9021	180	636	1r25
Laurel Fork Railway Company	4423	94	473	14.0
Leavenworth & Topeka Railroad Company	8324	170	410	47.0
Leesville, Slagle & Eastern Ry. Co	9079	180	453	10.35
Leetonia Railway Company	2497	72	807	8.7
Lenox Railroad Company	8654	124	95	7.7
Liberty-White Railroad Company	1514	70	411	24.2
Lorain, Ashland & Southern R. R. Co	4166	99	69	66.5
Macon & Birmingham Railway Company	5408	117	385	90.6
Macupin Railroad Company	5430	111	262	1.553
Madison County Railway Company	4877	90	645	7.0
Madison Southern Railway Company	2622	76	491	6.7
Manila & Southwestern Railway	7683	162	825	6.0
Marietta & Vincent Railroad Company	2838	76	695	10.0
Mead Run Railroad Company	8818	178	565	2.84
Memphis, Dallas & Gulf R. R. Co	2227	72	206	51.43
Milltown Air Line Railway	5830	117	867	10.0
Mineral Point & Northern Railway Co	7820	158	891	26.4
Mineral Range Railroad Company	6355	131	279	9.19
Minneapolis & Rainy River Ry. Co	8770	184	747	63.0
Minter City Southern & Western R. R	9632	189	179	3.75
Mississippi Southern Railroad	7782	158	476	46.87
Mississippi Valley Company	6867	145	289	20.06
Monroe & Texas Railroad Company	5084	105	129	2.51
Morenci Southern Railway Company	2278	71	580	18.0
Muscatine, Burlington & Southern R. R	3180	90	31	53.8
Nashua & Acton Railroad	4285	94	737	30.0
Natchez, Columbia & Mobile R. R. Co	9769	189	657	33.2
Neame, Carson & Southern R. R. Co	8718	117	326	25.32
New Castle & Ohio River Railway Co	6002	117	773	3.5
New Holland, Higginsport & Mt. Vernon R. R	5796	117	348	35.0
Oakdale & Gulf Railway Company	6517	131	484	17.6
Ocala & Southwestern Railroad Co	2477	72	509	6.0
Ocean Shore Railroad Company	98	67	780	53.628
Ohio & Kentucky Railway Company	9946	193	262	25.78
Oil Fields Short Line Railroad Co	3495	90	701	5.0
Oklahoma & Arkansas Railway	5846	117	351	20.2
Oklahoma Central Railroad Co	9776	193	793	80.99
Oklahoma-Southwestern Railway Company	7819	158	488	28.31
Ontonagon Railroad Company	8719	170	731	6.44
Orangeburg Railway	1066	67	789	17.7
Pajaro Valley Consolidated R. R. Co	6963	145	511	40.033
Patterson & Western Railroad Co	1219	67	746	23.6
Pelham & Havana Railroad Company	3373	90	51	25.3
Pigeon River Railway Company	8962	178	696	11.87
Potato Creek Railroad Company	6544	131	981	2.75
Poteau Valley Railroad Company	5267	105	738	6.6
Raquette Lake Railway Company	9403	199	278	18.12
Reading, Marietta & Hanover R. R. Co	8024	162	301	6.165
Reynoldsville & Falls Creek R. R. Co	10322	199	642	12.0
Rio Grande Eastern Railway Corp	8916	178	560	12.6
Roanoke Railway Company	5143	105	267	6.5
Rockcastle River Railway Company	8615	178	361	12.72
Rome & Northern Railway Company	3523	90	54	17.6
St. Clair & Western Railroad Company	9521	187	460	14.888
St. John & Ophir Railroad Company	7108	145	611	8.56
St. Louis, El Reno & Western Ry. Co	2724	79	77	42.2
Salem, Winona & Southern R. R. Co	6763	138	717	21.5
San Joaquin & Eastern R. R. Co	9038	193	217	56.0
Saratoga & Encampment Railway	4712	111	293	44.77
Sardis & Delta Railroad Company	7265	150	358	13.6
Savannah & Statesboro Railway Company	9771	189	366	35.5
Seaview Avenue Industrial Railway	8857	178	281	1.04
Sharpsville Railroad Company	7734	166	800	17.932
Sievern & Knoxville Railroad Company	8982	187	626	25.12
Silverton Railway Company	1549	72	13	17.0
Sligo & Eastern Railroad Company	7532	154	725	33.3

List of railroads abandoned, upon authority of Interstate Commerce Commission, 1921–1934—Continued

Name of Road	Finance Docket	I. C. C. Reports		Mileage
		Volume	Page	
Smethport Railroad Company	8818	175	868	8.46
Smoky Mountain Railway Company	8634	111	747	9.6
Spokane & British Columbia Ry. Co	1116	67	384	36.3
Stanley, Merrill & Phillips Ry. Co	9972	193	457	22.0
Statenville Railway Company	4021	90	546	14.0
Sugar Pine Railway Company	1508	70	478	14.15
Sunflower & Eastern Railway Company	8057	166	878	11.68
Superior & Southeastern Ry. Co	10308	199	315	24.0
Tabor & Northern Railway Co	10470	199	773	11.0
Tampa Northern Railroad Company	8395	166	515	12.29
Tennessee & Carolina Southern Ry. Co	9236	184	223	30.5
Tennessee, Kentucky & Northern R. R	10094	193	779	17.0
Townsville Railroad Co	10172	193	739	10.0
Trinity Valley & Northern Ry. Co	9766	189	411	5.17
Virginia & Southwestern Railway Co	9414	187	446	10.39
Virginia Southern Railroad Co	9066	180	504	25.85
Washington & Choctaw Railway Company	6234	124	673	10.5
Washington & Lincolnton Railroad Co	9073	184	639	20.1
Washington Run Railroad Company	8492	170	261	4.1
Washington Western Railway Company	7608	154	663	11.2
Waycross & Southern Railroad Company	7365	150	779	20.0
Waycross & Western Railroad Company	4892	105	146	21.0
West Clarion Railroad Company	4311	94	420	2.745
Western Arizona Railway Company	9961	193	145	23.41
West Virginia Midland Railway Co	8981	175	751	16.9
Wiscasset, Waterville & Farmington Ry. Co	8382	166	616	43.5
Wisconsin-Northwestern Railway	1269	70	51	18.3
Woodstock Railway Company	9610	189	19	13.69
Woodworth & Louisiana Central Ry. Co	5536	111	718	6.0
Wyoming & Missouri River Railway Co	5203	131	145	17.64
York Harbor & Beach Railroad Company	8700	117	695	11.0
Zanesville & Western Railway Company	8647	170	743	4.12
Zwolle & Eastern Railway Company	1985	71	193	10.0
Total				4,139.406

Lines of railroad completely abandoned since June 27, 1933, upon authorization of Interstate Commerce Commission

Name of road	Finance docket	I. C. C. reports		Mileage
		Volume	Page	
Ahukini Terminal & Ry. Co., Ltd	10366	199	579	19.4
Alabama & Northwestern R. R. Co	10399	202	4	22.0
Arizona Southern Railroad Co	10110	193	577	21.0
Barro Mountain R.R. Co	9876	193	758	13.07
California, Arizona & Santa Fe Ry. Co	10156	193	656	10.35
Caney Valley Railway Co	9946	193	262	12.81
Carolina & Northeastern Ry. Co	10344	199	353	8.14
Chester Railroad Co	9890	193	737	6.3
East Texas & Gulf Railway Co	10173	199	125	9.6
Elberton & Eastern Railroad Co	10141	199	76	34.62
Eriton Railroad Co	10068	193	633	.869
Halite & Northern Railroad Co	10227	199	271	3.197
Kansas City, Excelsior Springs & Northern Ry. Co	9790	193	407	8.72
Kauai Railway Co	10184	193	772	4.98
Ohio & Kentucky Ry. Co	9946	193	262	25.78
Oklahoma Central R. R. Co	9776	193	793	60.99
Raquette Lake Railway Company	9403	199	278	18.12
Reynoldsville & Falls Creek R. R. Co	10322	199	642	12.0
San Joaquin & Eastern R. R. Co	9938	193	217	56.0
Stanley, Merrill & Phillips Ry. Co	9972	193	457	22.0
Superior & Southeastern Ry. Co	10308	199	315	24.0
Tabor & Northern Ry. Co	10470	199	773	11.0
Tennessee, Kentucky & Northern Ry. Co	10094	193	779	17.0
Townsville Railroad Co	10172	193	739	10.0
Western Arizona Railway Co	9961	193	145	23.41
Total				455.356

Plaintiffs' Exhibit 33

AFFIDAVIT

Filed October 11, 1934

STATE OF NEW YORK,
County of New York, ss:

EDGAR J. MCCLEES, being first duly sworn, deposes and says that he is Secretary of and in charge of the Bureau of Information of the Eastern Railways, which is an association maintained by the Class I carriers operating in the so-called Eastern Territory, that is to say, approximately all carriers operating in the United States and located north of the Potomac River and east of Chicago, Illinois; that said Bureau deals primarily with matters relating to wages and working conditions of railway employees; that deponent has been employed in said Bureau for upwards of twenty years and, since 1922, has been in direct charge thereof; that deponent is frequently and repeatedly in negotiation with officers and representatives of the several labor organizations of railway employees, including officers and representatives of national organizations of said railway employees; that said Bureau of Information of the Eastern Railways is regularly and constantly engaged in the assembling and analysis of statistics and other data having relationship to wages and working conditions of railway employees, and the deponent is familiar with the matters hereinafter set forth and makes this affidavit with knowledge that it is to be filed in the above-entitled cause.

Deponent is familiar with the allegations set forth in Article VI, paragraph 4, of the Bill of Complaint herein, to the effect that the average age of officers and other official representatives of railway labor unions, who are not now performing any service for the carriers but who are duly designated and authorized to represent employees under the Railway Labor Act, is greater than the average age of carrier employees. At the request of counsel for the plaintiffs, the deponent caused an investigation to be made among the rail carriers of the United States for the purpose of ascertaining the present ages of such officers and other representatives of railway labor unions who previously had been in the service of said carriers and who had left such carrier service to enter upon service with such labor organizations. As a result of such a survey, it is found and the deponent avers that, of 640 persons whose age records were available with the said carriers, the average age of said 640 persons is 51 years, 3 months.

EDGAR J. MCCLEES.

Subscribed and sworn to before me this 12th day of September 1934.

[NOTARIAL SEAL]

CHARLES MCLERNON,
Notary Public, Nassau County.

Certificate filed in New York County.
New York County Clerk's No. 153, Register No. 5MC128.
Commission Expires March 30, 1935.

Plaintiffs' Exhibit 34

AFFIDAVIT

Filed October 11, 1934

STATE OF NEBRASKA,
County of Douglas, ss:

GEORGE H. WARFEL, being first duly sworn, deposes and says that he is Assistant to the Executive Vice President (Title of Officer) of the Union Pacific Railroad Company, (Full Name of Company) one of the plaintiffs in the above-entitled cause, and makes this affidavit on the basis of his own personal knowledge, except as to those matters hereinafter stated on information and belief, and as to those matters he verily believes them to be true and also states the sources of his information; that he makes this affidavit with full knowledge and intent that it is to be used as evidence in the said cause.

Affiant says further, that he has been in the employ of the Union Pacific Railroad Company for more than thirty-two years, in various supervisory positions in Maintenance of Way and Transportation Departments; that since January 1, 1927, he has been in charge of safety and accident prevention work on said Railroad, including investigation of accidents, preparation of reports for the Interstate Commerce Commission and study of accidents reported on other railroads; that he is Vice President of the National Safety Council, has been General Chairman of the Steam Railroad Section of that body and Chairman of various committees of the Safety Section, American Railway Association; that he also has knowledge of the conduct of safety work on other railroads and is quite familiar with the Interstate Commerce Commission statistics covering railroad accidents.

As to the safety of operation of railroads in the United States, Affiant makes this further statement: In the 15 or 20 years preceding the World War the railroads made extensive installations of block signals, interlocking plants, double tracks, grade separations, and similar improvements for safeguarding train movement. Since the return of the railroads to the management of their owners, following the period of Federal control, there have been many installations of automatic train control, centralized despatchers' control of signals and switches and other devices all looking to the elimination of train accidents and the greater security of passengers and freight carried. In addition to these direct provisions for safety, better and stronger cars and locomotives, heavier rail, and more permanent bridges were provided which greatly enhanced the safety of train movement.

Paralleling these physical improvements, the leading railroads about 1912 inaugurated a great Safety First movement which spread to all railroads of the country within a few years and which resulted in a continuous and aggressive campaign of safety education among

the officers and employes on practically all American Railroads, especially intensive during the past ten or twelve years.

The result of these investments in safety equipment, and of this educational campaign, has been a most striking reduction in accidents involving train operation and the safety of passengers, and a pronounced decrease in casualties among employes. The first effect was on the safety of passengers and is illustrated by the fact that whereas in 1905 there was an average of 1 railroad passenger killed for each 1,376,000 passengers carried, there was but 1 passenger fatality for each 17,921,000 passengers carried in 1932. That this progress has been consistent is shown by the following figures from Statement 4, page 81, I. C. C. Annual Accident Bulletin No. 101:

Year:						
1905, 1	passenger	killed	for	each	1,376,000	carried.
1910, 1	"	"	"	"	3,000,000	"
1915, 1	"	"	"	"	4,954,000	"
1920, 1	"	"	"	"	5,673,000	"
1925, 1	"	"	"	"	5,237,000	"
1930, 1	"	"	"	"	11,658,000	"
1932, 1	"	"	"	"	17,921,000	"

Decrease in frequency, 77%.

Interstate Commerce Commission rules designate as "Train Accidents" any accidents in connection with the operation of trains, resulting in more than $150.00 damage to the carrier's equipment, track, or other property. While much progress had been made in eliminating collisions, derailments, etc., break-downs and mishaps were still occurring at the rate of 22.77 train accidents per million train-miles in 1923. These have been steadily reduced until in 1932 the rate was only 7.09 train accidents per million train-miles run, a decrease of 69% in frequency in 10 years. The progress through the intermediate years is shown in the following table:

Year	Total Frt. Pssr. and Motor Train Miles (Thousands)	Total Train Accidents	Frequency Per Million Train Miles
1923	1,207,714	27,497	22.77
1924	1,171,812	22,398	19.09
1925	1,187,731	20,785	17.50
1926	1,211,617	21,077	17.39
1927	1,184,455	18,976	16.02
1928	1,169,442	16,949	14.49
1929	1,178,585	17,185	14.58
1930	1,082,396	12,313	11.38
1931	951,220	8,052	8.46
1932	813,091	5,770	7.09

Decrease in frequency, 69%.

A further evidence of the success of the intensive safety educational work inaugurated immediately after the War, is the decline in casualties to employes. In 1923 there was an average of 30.89 casualties to employes for each million man-hours. These have been consistently and almost uniformly reduced during the decade, until in 1932 the rate was 7.39 casualties per million man-hours worked,

a decrease of 76% in the frequency of injuries to employes accomplished in 10 years. The figures for the decade follow:

Year	Total man-hours worked by all employees (thousands)	Total employees killed & injured			Total casualty rate all employes per million man-hours
		Killed	Injured	Total	
1923	4, 856, 964	1, 866	148, 146	150, 012	30.89
1924	4, 473, 186	1, 403	120, 912	122, 315	27.34
1925	4, 448, 377	1, 460	114, 639	116, 099	26.10
1926	4, 557, 537	1, 528	107, 218	108, 746	23.86
1927	4, 406, 627	1, 427	83, 883	85, 310	19.36
1928	4, 191, 065	1, 187	66, 744	67, 931	16.21
1929	4, 225, 292	1, 302	57, 164	58, 466	13.84
1930	3, 641, 412	898	33, 184	34, 082	9.36
1931	2, 930, 657	621	21, 417	22, 038	7.52
1932	2, 286, 561	532	16, 359	16, 891	7.39

Decrease in frequency, 76%.

The men who operate the locomotives, switch the cars, and man the trains, commonly classed as "trainmen", are naturally exposed to more occupational hazards than any other general class of railroad employes. Their casualty rate was 39.60 per million man-hours in 1923 and had been reduced to 15.27 per million man-hours in 1932. This reduction had been consistent and in harmony with the figures in other kinds of accidents as the following table shows:

Year	Man-hours worked by Trainmen (Thousands)	Number Trainmen Killed	Number Trainmen Injured	Total Trainmen's Casualties	Total Casualty Rate Per Million Man-hours
1923	915, 084	[illegible]	35, 342	36, 238	39.60
1924	829, 533	[illegible]	28, 438	29, 066	35.04
1925	831, 682	691	28, 297	28, 989	34.86
1926	858, 598	691	29, 864	30, 555	35.59
1927	812, 853	639	24, 462	25, 101	30.88
1928	776, 184	501	20, 943	21, 444	27.63
1929	785, 504	587	19, 116	19, 703	24.96
1930	673, 208	423	11, 771	12, 194	18.11
1931	546, 277	292	8, 259	8, 551	15.65
1932	431, 063	265	6, 318	6, 583	15.27

Decrease in frequency, 61%.

A marked decrease in the volume of annual man-hours as compared with the preceding year generally means that there was a decided reduction in the number of men employed (except in 1932 when the reduction was due more to spreading work by decreasing the hours per man). Force reduction almost invariably means laying off the younger, less-experienced men.

It is significant that pronounced force reductions, as indicated by annual man-hours, are accompanied by pronounced decreases in annual accident and casualty rates. There have been very few new or inexperienced employes taken into railroad service since 1929. The work has been carried on almost exclusively by the older, more experienced, and more thoroughly trained men. The low accident and casualty rates since 1929 clearly indicate that safety of railroad operation is best assured by retaining the older and more experienced

men as long as they are able to render full, active service, and by avoiding, so far as possible, the necessity for inducting large numbers of young, and inexperienced men into service.

Affiant says further that in the foregoing statement the statistics as to train-miles run, man-hours worked, passengers carried, accidents, and casualties were abstracted by him from the annual accident bulletins and operating statistics of the Interstate Commerce Commission, and the casualty rates and percent of improvement were calculated by him and are correct to the best of his knowledge.

GEO. H. WARFEL,
(Name of Affiant)
Assistant to Executive Vice Pres.
(Title)
UNION PACIFIC RAILROAD COMPANY,
(Railroad name in full)
Omaha, Nebr.
(Address)

Subscribed and sworn to before me this 15th day of September 1934.

[SEAL] F. A. BREITTENBACH,
Notary Public.

My commission expires February 10, 1938.

Thereupon the plaintiffs rested.

EVIDENCE FOR DEFENDANTS

Defendants offered in evidence the affidavit of Joseph B. Eastman as Defendants' Exhibit No. 1. The plaintiffs objected separately and severally to certain portions of the affidavit and moved specifically as to each of these portions that it be struck out. It was agreed between the parties and the Court that the objections of plaintiffs to said Eastman affidavit and such objections as plaintiffs should wish to interpose against any others of defendants' affidavits might be filed; that all of such objections would be overruled and an exception granted to plaintiffs in each instance.

Defendants' Exhibit 1 was admitted in evidence, as follows:

Defendants' Exhibit 1

AFFIDAVIT

Filed October 10, 1934

JOSEPH B. EASTMAN, being duly sworn, deposes and says:

I am the Federal Coordinator of Transportation, appointed pursuant to the provisions of the Emergency Transportation Act, 1933, and am a member of the Interstate Commerce Commission. I have held the latter position since February 1919.

The office of Federal Coordinator of Transportation is created by Section 2 of the Emergency Transportation Act, 1933, "in order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation."

In Section 13 of the Act the Coordinator is "authorized and directed forthwith to investigate and consider means * * * of improving transportation conditions throughout the country, including * * * the stability of railroad labor employment and other improvement of railroad labor conditions and relations; and from time to time * * * submit to the Commission such recommendations calling for further legislation to these ends as he may deem necessary or desirable in the public interest."

Pursuant to this direction, I established in my organization a section of labor relations in charge of Otto S. Beyer, an engineer of wide experience in labor matters. One of the subjects which this section has undertaken to study is ways and means of providing greater economic security for railroad employees. To aid in this study, an advisory committee was selected, made up of men who have given much thought to the human problems of industry. This committee submitted to me a comprehensive and able statement of principles outlining a plan which embraces a system of retirement annuities, a placement service for the transfer of employees and the location of jobs for them, a system of unemployment benefits, and the payment of dismissal compensation to employees released from service in connection with certain economy programs. But the committee's report was a bare outline of a plan. Before specific detailed recommendations could be made, much information had to be collected and studied. In order to supply the needed fund of facts upon which such specific recommendations could be based, I caused to be instituted, with funds provided by the Civil Works Administration, an extensive collection of the employment histories of 400,000 railroad employees and 110,000 railroad pensioners. The data thus collected were to furnish information not only with respect to pension and retirement system but also with respect to other problems of employment.

On April 26, 1934, I appeared before the subcommittee of the Senate Committee on Interstate Commerce and on June 8, 1934, before the Committee on Interstate and Foreign Commerce of the House of Representatives and made statements in connection with the railroad pension and retirement bills which those committees were then considering. In the course of my statement, I criticized specific provisions in these bills. As a result, many of these provisions were eliminated or changed in the Railroad Retirement Act as it was finally enacted.

In the course of my statements before the committees, I recommended that enactment of the legislation be postponed. This recommendation was based, not on opposition to the principle of a retirement and pension system, but on the ground that sound and wise legislation could not be enacted until the data, above mentioned, which my staff was collecting and analyzing, should be made available.

Railroading is an old, established industry. Its age alone brings about much superannuation among its employees. This natural tendency is enhanced by the employment rules in force on the railroads, especially the system of seniority, whereby the younger service men are the first to be laid off and the older service men the first to

be promoted, and whereby the older service men have rights, when unemployed, to dislodge the younger service men. Because of these facts, the superannuation among railroad employees is probably much in excess of that existing in industry generally.

This excessive superannuation is detrimental to railroad service in several ways. Men who have grown old in the service decline in efficiency. The carrier pays in wages an amount out of proportion to the service rendered. These conditions exist upon the railroads at the present time. There is now a large body of superannuated employees in railroad service who, for the good of the service, ought to be retired.

Pension systems, of one sort or another, have been in existence in the railroad industry for as long as 50 years. The need for them was recognized by the more progressive carriers at an early date. In late years particularly, with the voluntary systems in danger, the matter of retirement and pensions has been a crucial issue in railroad employment. Withdrawal or extensive curtailment of existing pensions in the railroad industry would impair the morale of railroad employees and play havoc with railroad labor relations. It would, in addition, increase the existing excessive superannuation among railroad employees and block the employment and promotion of younger men.

The experience with the voluntary pension systems has been unsatisfactory. The systems were established gradually, each carrier tending to copy plans already in effect. No very penetrating thought was given to them. Some modifications were made in the light of experience and certain practices were changed, but all within the original framework. The depression brought clearly to light their many weaknesses and uncertainties.

In the light of this experience, a compulsory, automatic, and uniform retirement and pension system for the whole railroad industry is in my opinion desirable. And I am further of the opinion that the establishment of the system contemplated by the Railroad Retirement Act will impose less of a financial burden on the railroads than they contend; first, because the retirement of the superannuated employees will give opportunities for younger and more efficient men, and in some instances no replacements will be necessary; and, second, because it will make it easier to obtain economies in operations which are quite possible of accomplishment.

In a public statement made on September 19 before the National Petroleum Association I analyzed briefly present-day railroad problems and indicated what is being done and may be done with respect thereto. That statement, a copy of which is annexed hereto, is, I believe, accurate and true.

I make this affidavit for use in the above-entitled cause.

JOSEPH B. EASTMAN.

Subscribed and sworn to before me this 29 day of September 1934.

[SEAL]

J. FORNEY DONALDSON,
Notary Public.

My Commission expires Sept. 14, 1938.

For Release Not Earlier than 3 o'clock p. m., September 19, 1934

Attached is an address which the Federal Coordinator of Transportation will make before the National Petroleum Association at Atlantic City, N. J., in the afternoon of September 19, 1934.

Address of Joseph B. Eastman, Federal Coordinator of Transportation, Before National Petroleum Association at Atlantic City, N. J., September 19, 1934

Railroad problems

The National Petroleum Association is, if I am correctly informed, one of the oldest, if not the oldest, association of petroleum producers in the country, and its history goes back very definitely and intimately to the time of railroad rebates, when the Standard Oil Company was profiting by that means at the expense of the independent oil producers of Pennsylvania and Ohio. The association has always had, I believe, a lively interest in railroad rates and their regulation, it has participated in many important proceedings before the Interstate Commerce Commission, and it is well acquainted in a very practical way with railroad transportation and its problems. Not only that, but there are few, if any, oil producers today who have not had opportunity and reason to become well acquainted with motor-truck and water transportation. It is a pleasure, therefore, to address you, because I know that you are not only interested in the matters which I shall discuss but know a great deal about them.

My present office, as Federal Coordinator of Transportation, is a temporary one, and it was created for two principal purposes. One was to help the railroads eliminate waste and other unnecessary expense, and the other was to study the entire transportation situation and advise the President and Congress what should be done about it. As is well known, railroad earnings have for some time been very low, and the financial condition of a number of the companies is precarious. The railroad industry ranks near the top of the key industries of the country. Most people are users of the railroads, the railroads buy the products of many other industries, and a very large part of the population is financially interested, in one way or another, in their securities. Railroad welfare is, therefore, a matter of vital and general concern.

Of course, the main present trouble with the railroads, although it is one which many people seem not to understand, is the low volume of their traffic. Railroads reflect very closely general economic conditions, for they produce nothing but service to others, and they cannot move the products of industries except to the extent that those products are produced. A marked revival in general business would do more than anything else to help the railroads, and they would profit very quickly from such a revival, because they now have their affairs in such shape that they can operate more cheaply than they did in 1929. At the same time there is much of the vicious circle in the situation, because the railroads are among the largest consumers, and when they curtail their buying, as has happened in large degree, that in itself has a very depressing effect on general business. The revival of business would have a fine effect on the

railroads; but, on the other hand, railroad revival would have a most excellent effect on business. The Government has realized this, and the loans, amounting to nearly $200,000,000, which the Public Works Administration has made to the railroads on favorable terms for much-needed new rails, equipment, and general maintenance work have been of decided benefit to the capital goods industries as well as to the railroads. I hope and expect that this policy can be continued.

In some quarters there has been a recent recurrence of the old complaint that the trouble with the railroads is that a misguided Interstate Commerce Commission has kept rates on too low a level. This audience tempts me to say a word about that, because you have practical knowledge of the subject. My guess is that so far as the rates on petroleum and its products are concerned, your judgment would be that the Commission has erred, if at all, in seeking too high rather than too low a level of freight rates. Certainly we both know that many of the rates which the Commission prescribed in its comparatively recent general investigations of petroleum rates were afterward voluntarily reduced by the railroads.

The Commission has ordered no general reductions in rates since the 10-percent reduction in 1922, which followed unprecedented increases of far larger volume in the period from 1917 to and including 1920. Among the conclusions reached by the Brookings Institution in its impartial study of the American Transportation Problem, published in 1933, were these:

Decisions of the Commission relating to the level of rates and to particular rates did not, between 1923 and 1929, appreciably reduce the general level of freight rates.

Since 1929 the Commission has granted some rate increases; but the increasing severity of the competition of other agencies of transportation and the depression have resulted in a reduction of the level of freight rates.

Certain it is that within the past few years the Commission has authorized important increases in rates on particular forms of traffic of which the railroads have been unable to take full advantage. Indeed, one of their more recent complaints is that the Commission has been too slow in permitting them to reduce rates to meet the competition of other forms of transportation. Upon analysis, therefore, the indictment against the Commission boils down to the general reduction of 10 percent which it ordered in 1922. The essential facts are these:

1. That reduction was generally regarded by the industries of the country as necessary to their welfare, and many railroad officers felt the same way about it.

2. It was followed by a period of earnings surpassed in few, if any, periods of railroad history.

3. Throughout that period the freight traffic earned a generous return. The failure of aggregate railroad earnings to attain on the average the standard of 5¾ percent on property value was due almost wholly to the passenger business, which steadily decreased. The standard passenger fare, which became 3.6 cents per mile in 1920, plus the surcharge on Pullman traffic, was not reduced in 1922

There are many who now think—and I am one of them—that it would have been better if it had been reduced. The long-postponed reductions are now being made in drastic measure.

4. After the 1922 reduction the railroads did not at any time seek a general increase in rates until the preposterous request for a 15 percent increase in 1931, at a time when commodity prices generally and traffic were falling sharply and competition from other transportation agencies was rapidly increasing.

I ask your pardon for this excursion into the past, but the temptation was too great.

Next to the general depression, the thing which has hurt the railroads most severely has been the greatly increased competition which they have met from other forms of transportation, some of them old and some of them new, including the motor trucks and busses, the private automobile, the water lines, the pipe lines, and the airplanes. The most serious of these forms of competition is probably that given by the highway motor vehicle, because it is encountered everywhere. Next Friday I shall give a talk on that particular subject. I do not wish to steal my own thunder, but I can say a few things to you.

I favor Federal regulation of motor carriers and water carriers, along with the railroads, by the Interstate Commerce Commission, but not because I either hope or expect that this will be harmful to these forms of transportation. On the contrary, I believe that it will promote their best interests, as well as those of the railroads. All transportation agencies need public regulation as a protection against overdevelopment and destructive competition from irresponsible operators in their own ranks and from other transportation agencies, and to promote conditions of order, stability, and growth along sound lines. The country needs it as a protection against gross waste, unknown, unstable, undependable, and discriminatory rates, irresponsible operators, uncertain and unsafe service, unsound labor conditions, and a general financial demoralization which always reacts against those who use transportation as well as against those who invest in it.

The motor carriers have made great and important changes in the art of transportation. They are here to stay, and the railroads have much to learn from them. The railroads must adjust their equipment, service, and rates to meet the new conditions which these highway vehicles have created. The two forms of transportation can work together to much mutual advantage and can increase very materially the demand for and the volume of transportation. My small staff is probing deeply, with the help of both the railroads and the motor carriers, into these possibilities. It is analyzing the costs of various types of railroad operation, on the line and in the terminals, and is comparing these with the costs of corresponding service performed by highway motor vehicles. It has already made a most elaborate report on the handling of merchandise traffic which I commend to your attention, because it is startling in its presentation of the facts in regard to this traffic and proposes definite means for improvement in methods of handling which combine greater economy with better service and include a most extensive use of trucks in terminal operations and also a complete simplification of the rate structure. Time must be allowed for such a report to per-

colate through the railroad and shipping world before definite results can be expected, but the percolation is proceeding at a reasonably rapid rate.

Similar reports on both the carload freight traffic and the passenger traffic are in course of preparation. I am confident that the conclusions will be equally illuminating, and I know that they will be buttressed by such an array of information in regard to these forms of traffic and their costs and methods of handling as has never hitherto been assembled. I can say this with all modesty, for the credit will be due to my staff and not to me, and they must share it with the railroads and many others who have cooperated to the full in procuring the facts desired.

One of my duties is to look for wastes and unnecessary expense in railroad operation. Immediate savings in any large measure were precluded by the restrictions in the act against reductions in railroad employment. For that reason, instead of concentrating on smaller projects which might quickly have been accomplished but for these restrictions, I have been devoting major attention to broader surveys directed not only to the saving of expense but to the reshaping and reinvigoration of railroad operation and service to meet present-day conditions. Plainly the vital, essential thing is increase in the demand for transportation and in the volume of movement, and the sine qua non is better service at lower cost. There is no conflict between the interests of labor, the investor, and the general public in the attainment of this end. They are identical. Furthermore, I thoroughly believe that if the improvements in the art of transportation which have already been made and those which are impending are rightly utilized, we are on the verge of new developments in railroad and other transportation which will have benefits of very wide range and reach. They will, for example, be of considerable benefit to the capital goods industries of the country, which are greatly in need of help.

The investigations which my staff is making cover a wide field. The traffic surveys which I have already mentioned are going into the opportunities for pooling traffic, using trucks or busses to supplement or substitute for rail service, making trains shorter or more mobile with increased frequency of service, introducing light-weight equipment and demountable containers capable of transfer from car to truck, reducing the costs and delays of terminal operations, simplifying freight rates and adjusting them to modern competitive conditions, and adjusting passenger service and rates to the needs and desires of the traveling public. Particular attention, through advisory committees and equipment manufacturers, is being given to such matters as the design of new types of equipment and the use of light-weight metals in their construction. For example, we are exploring the opportunities of this kind in connection with tank cars, such as are used in the movement of petroleum and its products. We are also considering what the railroads could do in the way of train-load rates on these commodities.

Other studies, completed or nearing completion, cover the important but highly controversial subject of car pooling; unification or joint use of terminal facilities; the better utilization and equipment of shops; standardization and simplification of equipment, materials,

and supplies; the establishment of a centralized scientific research organization; improved methods in the merchandising or selling of railroad services; improved purchasing methods; better methods in the disposition of scrap and in the handling of stores; the pooling and better utilization of grain elevators; a clearing house for interline accounting settlements; the establishment of dockage charges; the establishment or increase, where practicable, of handling and wharfage charges at port terminals; the strengthening of demurrage bureaus; the better supervision of packing and loading requirements; the use of private freight cars; cancelation of unwarranted allowances to shippers; and other minor matters.

There is, I assure you, nothing academic about these inquiries. They are being carried on by men on my staff who have had much practical railroad experience, and a vast amount of the work is being done by the railroads themselves. We are also receiving much help from the Commission, from shippers and travelers, from other transportation agencies, from equipment manufacturers, and from others. My staff is small, and these studies would be impossible without such help. I have tried to make it plain from the outset that the Coordinator is not the fount of all wisdom or a Moses to lead the railroads out of the wilderness. The point is that transportation is in a period of rapid change, and the time is ripe for a comprehensive survey of the railroad situation and of the opportunities for future development. As an agency of the Government I am, no doubt, in a better position to organize such a survey than any private agency, because I am removed from the competition and rivalries of individual railroads, and can also enlist the aid of other interests.

No one should expect that these surveys and studies will revolutionize the railroad industry or that large and important results will follow in short order, and certainly I have no such expectations. The industry is too large and ponderous and well-established to permit of rapid changes. I do expect that these inquiries which we are making with the help of others will focus attention upon some of the vital problems of railroad management and operation, bring to the forefront many new possibilities and constructive ideas, and point the way to changes which will link economy with more and better service. There are few things of more importance to the country than the proper coordination of all of the various transportation agencies, their utilization to the best economic advantage, and the promotion of order and stability in the transportation industry. And if I may emphasize again the objective which any such program should place above all others, it is, I believe, the promotion of a system of transportation which will swell the volume of interchange and movement by furnishing better facilities at lower cost.

There are various other collateral inquiries upon which my staff is at work. One of the transportation issues which has provoked much controversy is what I call the subsidy question. It is alleged that certain forms of transportation are receiving undue Government aid which gives them an unfair competitive advantage over others. This allegation is directed particularly against the water carriers, because of the waterways built at Government expense, and against the motor carriers, because of the highways likewise built at public expense. We have been going thoroughly into this matter, covering all classes

of carriers in our inquiry, and expect to be able before long to announce definite conclusions on the facts and to recommend whatever legislation may be needed to correct any situations found to be in need of correction. The subject is far more complex and difficult than is commonly supposed, but we have spared no effort to get to the bottom of it and have enlisted the help, I think, of all who have made a close study of it from any point of view.

It has been alleged, also, that labor conditions are below par in some of the transportation agencies, and that this introduces an element of unfair competition. With the help of the Department of Labor we have been going into this matter, and shall shortly report our conclusions and recommendations. Along much the same line, we are looking into numerous working rules on the railroads which are alleged to be unduly onerous, for the purpose of developing the facts.

Several important railroads are in receivership or bankruptcy, and others are in severe financial straits because of the heavy burden of their debts and fixed charges. It is important to facilitate and encourage the reorganization of such railroads along lines which will enable them to face the future with better credit prospects. Past experience has shown that such financial reorganizations, if well and soundly done, are usually in the best interests of all concerned. Like a surgical operation, they open up the way to future health. This subject is receiving attention with the aid of the Reconstruction Finance Corporation and the Department of Justice.

Consolidations of railroads are not a panacea for railroad ills and may be open to grave objections. Yet they have often proved beneficial in the past, and there are opportunities for their useful employment in the future. One of the objectionable features which too often has attended such railroad unions in the past is that they have been preceded by market operations and campaigns for the purchase and control of railroad stocks. These operations have depleted railroad funds which might better have been used for other purposes and have created speculative and unhealthy market conditions. If consolidations could be achieved without such preliminary forays of money spending, through exchange of securities and without the use of cash, it would be of great public advantage. This problem is also receiving attention.

If widespread economies in railroad operation are to be accomplished through collective action, and with the possible aid of the Government, railroad labor is entitled to protection against the shock of sudden displacements, particularly in times like these. We are endeavoring to find a way of extending such protection without putting a stop to changes in methods of operation which in the long run will be of much benefit to railroad labor itself. I am hopeful that such a way can be found. In this connection, let me say a word about the recent Railroad Retirement Act. I was not satisfied with that Act, and so indicated in my appearances before Congressional committees, because I believed that it had not been thoroughly worked out and that its adoption could well be deferred. Nevertheless the Act is sound in general principle, and it will not be so much of a burden upon the railroads as they would have the country believe. The retirement of superannuated employees through this

Act—and there are many such employees in the railroad world—will give opportunities for younger and more efficient men, and it will also make it easier to obtain economies in operation which are quite possible of accomplishment.

So long as transportation agencies are privately owned and operated, there is little that the Government can do to further their welfare, short of actual subsidies, except to maintain a system of regulation which will, without paralyzing initiative, prevent exploitation, discourage destructive competition, promote order and stability, and permit an adequate return to be earned on legitimate investment, and also to extend every possible aid, consistent with public safety and the well-being of employees, to improvements in management, operation, and financial organization which will tend toward more and better service at the lowest possible cost to the public served. Given such conditions, the remainder of the problem must be left for the private managements to answer. I have tried, in my work as Federal Coordinator of Transportation, to be guided by these principles.

Defendants offered in evidence the following affidavits and exhibits identified as Defendants' Exhibits Nos. 2 to 13, respectively:

Defendants' Exhibit 2

AFFIDAVIT

Filed October 10, 1934

DISTRICT OF COLUMBIA
City of Washington, ss:

MURRAY W. LATIMER, being first duly sworn, deposes and says:

On advice of counsel, I state my qualifications as an expert in the field of *industrial pensions* and retirement insurance:

I am the author of the following books bearing on the field: "Industrial Pension Systems in the United States and Canada" (two volumes); "Trade Union Pension Systems and other Superannuation and Permanent and Total Disability Benefits in the United States and Canada"; both published by Industrial Relations Counselors, Inc., in 1932; and the following articles and pamphlets: "Old Age Pensions in America", published by the American Association for Labor Legislation (1930); "Why Fund the Railroad Pension Plan?", published by Railway Age (1930); "Relation of Maximum Hiring Ages to the Age Distribution of Employees and to the Problem of Unemployment Among Older Workers", published by American Management Association (1930). I also prepared the sections on Industrial and Trade Union Pension Plans for the 1930 report of the New York Commission on Old Age Security.

As a member of the staff of Industrial Relations Counselors, Inc., I have been consultant on pensions for the following corporations and associations:

Buckeye Pipe Line Company
Corning Glass Works
Eureka Pipe Line Company
Freeport Texas Corporation
Illinois Pipe Line Company

Indiana Pipe Line Company
National Transit Company
New York Building Congress
New York Transit Company
Northern Pipe Line Company
The Ohio Oil Company
Solar Refining Company
Southern Pipe Line Company
South Penn Oil Company
Southwest Pennsylvania Pipe Lines
Standard Oil Company (California)
Standard Oil Company (New Jersey)
Standard Oil Company (Ohio)
Texas Corporation
Tidewater Oil Company

I have been consultant on pensions to the Federal Coordinator of Transportation, and directed, in the course of that work, economic, actuarial, and statistical studies of retirement and pension systems on railroads of the United States. I am a member of the Advisory Committee to the Secretary of Labor, which committee has been engaged in statistical studies bearing on the problems of labor generally. I am a member of the Technical Board of the President's Committee on Economic Security, and am Chairman of the subcommittee on old-age insurance of that Board. I am the Chairman of the Railroad Retirement Board and a defendant in this cause.

Inadequacy of Individual Resources to Meet Hazards of Old Age

A categorical statement that a very considerable proportion of the aged of this country are dependent upon others for part or all of their support, or else live at a level far below the minimum of subsistence, cannot be denied. In a study made in the most prosperous industrial section of the country in the period of the greatest prosperity this country has ever seen, the National Civic Federation found that over one-third of the population, age 65 and over (constituting what is commonly called the aged group), had property of less than $5,000 and annual incomes of less than $1,000. One-quarter of this population received annual incomes of less than $500. Studies at other times and places in the eastern United States have shown as high as 40 percent of the population, age 65 and over, to have property of less than $5,000 and annual incomes of less than $500. A survey in the fall and winter of 1929 in New York indicated that almost one-quarter of the population, age 65 and over, to be without any income whatever (1930 Report of the New York Commission on Old Age Security).

There are no comparable studies covering periods of depression. The Federal relief census of 1933 showed 7.2 percent of the population age 65 and over to be in receipt of relief. Excluded from this number were all persons with children or other near relatives able to provide them a bare minimum of subsistence; all persons in almshouses; some 115,000 persons, mostly over 70, in receipt of old-age pensions averaging about $20 per month; and all persons receiving support from private and public sources other than the federal relief system.

The progressive industrialization of the nation has resulted in an increasing inability of the older part of the population to secure gainful employment. This is shown by the percentages of the total population, 65 years old and over, who were reported as being gainfully occupied in the successive decennial censuses:

	Male	Female	Total
1890	73.83	8.29	41.74
1900	68.50	9.10	39.09
1920	60.12	8.04	34.25
1930	58.30	8.05	33.24

Although, among the gainfully occupied as a whole, the risk of unemployment seems no greater for those over 65 than for the younger (most of those unemployed at these ages apparently counting themselves as being permanently unoccupied), in manufacturing and mechanical industries and in transportation and communication, constituting the backbone of an industrial society, the risk of unemployment is greatest at ages 65 and over, except for the very youngest group.

It is a very common practice for steam railroads to provide in their pension or employment rules a maximum hiring age. A provision that "no person inexperienced in railway work over thirty-five years of age, and no experienced person over forty-five years of age, shall hereafter be taken into the service", or some similar provision, is found in a large percentage of the railroad voluntary pension plans. Similar restrictions are found in many other industries.

Thus the economic situation of the aged, never good, has, for more than a generation at least, been growing progressively worse.

Cause of Old Age Dependency Under Modern Industrial Economy

During the current depression unemployment has increased among people of all ages. But among persons 65 years old or over unemployment has increased persistently over a long period of years in good times as well as bad. This persistent tendency of unemployment to increase in the aged group is due to a complex of causes, chief of which are the technological changes through which industry has passed. In many parts of industry the physical requirements imposed upon the workers are such that many employments are not open to persons beyond the prime of life. While there are many subsidiary employments in which the strain is less intense, it is these occupations where the possibilities of mechanization are greatest, and hence in these fields which formerly were open to the older workers opportunities for employment are constantly becoming less. Generally speaking, the possession of skill by an individual worker has been a partial guarantee against unemployment in old age. The demands of the labor market and technological changes now tend, however, to decrease the number of jobs in which skill is required in favor of semiskilled occupations. While there is an offsetting factor here in the change from unskilled hard labor occu-

pations to semiskilled, lighter work, the rate of change and technique has been such that even in those cases in which little skill is required there has been an increase in the requirement of suppleness, adaptability, and judgment, even though limited, which persons past middle age find it difficult to fill. Thus, the net result of the aggressive mechanization of industry has been steadily a reduction in the opportunities for employment among the older workers.

The relation of the public to industry in general has been such that the older workers have received some protection in their jobs from that direction. Public opinion has constantly refused to countenance dismissals of aged employees who had grown old in the service of their employees. Nevertheless, by reason of business uncertainties and the failure of business enterprises, an appreciable number of older workers are displaced from industry from time to time; and in periods of depression this number is greatly augmented. Once unemployed, the older worker finds it virtually impossible to secure a new job.

Under the system of free competition in the labor market which has generally characterized industry in the United States, employers have been enabled to secure employees at wages which on the average cover no more than current living expenses, and from which savings sufficient to enable the employee to support himself in old age are impossible. The study made by the Federal Coordinator of Transportation, referred to above, included an analysis of the average annual compensation for the years 1924 to 1933, including in such average both employees who worked full time and those working part time, but excluding the persons working part time by reason of their entering into or separating from the service during a particular year. The average annual compensation shown by the study for the two largest groups of employees, namely, those engaged in the maintenance of way and structures, and the maintenance of equipment and stores, are shown in the tabulation on the next page for the ten-year period. These averages are probably higher than the actual averages, in part because of the labor turn-over in these groups tending to conceal a certain amount of unemployment, and in part because there appears to have been inadequate reporting on the lowest wage groups.

Year	Maintenance of way and structures	Maintenance of equipment and stores	Year	Maintenance of way and structures	Maintenance of equipment and stores
1924	$1,074	$1,430	1929	$1,070	$1,621
1925	1,050	1,472	1930	1,067	1,515
1926	1,047	1,519	1931	976	1,304
1927	1,094	1,545	1932	867	1,153
1928	1,078	1,534	1933	804	1,114

The United States Bureau of Labor Statistics (Monthly Labor Review, December 1919) described a "standard of health and decency budget" providing for a family of five a sufficiency of nourishing food, housing in low rent neighborhoods with the lowest possible number of rooms consistent with decency, the upkeep of household equipment, clothing sufficient for warmth and of a suf-

ficiently good quality to be economical, but with no further regard for appearance and style, and, finally, a surplus over the above expenditures permitting a minimum outlay for transportation to work and markets, a modest amount of insurance, medical and dental care, contributions to churches and labor and beneficial organizations, simple amusements, and a daily newspaper. The Labor Bureau, Incorporated, of New York, has priced this budget of the United States Bureau of Labor Statistics at various times and places and has published the sum total of those prices, indicating the cost of this budget, in its publication entitled "Facts for Workers", in the August 1930 issue thereof, in 1921, 1922, and June 1930. Fluctuations in the cost of living were not great in the period intervening between 1922 and 1930, judging by the index of the United States Bureau of Labor Statistics for the whole United States. In no case did the total price of maintaining the budget described above fall lower than $2,000, and on the average it would be in excess of $2,000 for the places in which the budgets were priced. Even making allowance for the fact that some employees of carriers in the classes of service for which average wages were given above were living in areas not covered by the Labor Bureau, Incorporated, data, it is apparent that on the average their income was under the standard of health and decency budget formulated by the United States Bureau of Labor Statistics.

Average annual income of other groups, according to the study made by the Federal Coordinator of Transportation, are somewhat higher than in the two groups for which figures have been given above. Averages of the four main other groups are as follows:

Year	Professional, clerical, and general	Transportation other than train and engine and yard	Transportation, yardmaster, switchtenders, and hostlers	Transportation, train engine, and yard	Year	Professional, clerical, and general	Transportation other than train and engine and yard	Transportation, yardmaster, switchtenders, and hostlers	Transportation, train engine, and yard
1924	$1,656	$1,407	$1,944	$2,042	1929	$1,751	$1,476	$2,095	$2,225
1925	1,664	1,406	2,008	2,144	1930	1,776	1,478	2,099	2,137
1926	1,664	1,406	2,012	2,140	1931	1,762	1,453	1,969	2,002
1927	1,725	1,454	2,069	2,195	1932	1,561	1,249	1,681	1,659
1928	1,745	1,481	2,054	2,189	1933	1,545	1,233	1,664	1,648

For the same reasons as indicated above, these averages may somewhat overstate the actual average earnings. The Labor Bureau, Incorporated, in the publications referred to above, also published a cost of skilled workers budget. At no time or place where this budget was priced did the cost fall as low as $2,400 per annum. Making all allowances for variations in time and place and broader geographical spread of railway employees, it is not possible to avoid the conclusion that the level of railway wages has not been sufficiently high for skilled employees to enable the majority of such employees to maintain the level of the skilled workers budget compiled by the Labor Bureau, Incorporated; and a very considerable majority of the workers could not have maintained the "standard of health and decency" budget.

On account, among other things, of the changing industrial techniques employed in modern industry, the capacity to produce is at almost all times in excess of actual production. For many years there has existed, mainly on this account, a surplus number of potential industrial workers who have been unable to find employment, by reason of the displacement due to mechanization. Industry has largely gained by reason of this displacement, since it has constantly been increasing its power to produce with the same labor force, or to produce the same quantity with a smaller labor force. While in the long run this may have resulted in general benefits through the lowering of prices, the lack of immediate effectiveness in competition has been such that industry has been able to retain its gains for appreciable periods. Referring to the railroad industry specifically, a study made by the United States Bureau of Labor Statistics indicates the following changes in per capita productivity since 1916.[1]

Year	Relative productivity of all railroad employees, except executives	Year	Relative productivity of all railroad employees, except executives
1916	73.4	1925	96.9
1917	77.0	1926	100.0
1918	76.0	1927	99.8
1919	80.6	1928	104.8
1920	81.8	1929	106.7
1921	83.1	1930	106.7
1922	86.5	1931	107.4
1923	89.4	1932	105.0
1924	91.8		

This table shows that the efficiency at the end of 1932 was 5 percent greater than in 1926, 28 percent greater than in 1920, and 43 percent greater than in 1916. Thus, to do the work which would have required 1,000,000 men in 1916, would have taken only 700,000 men in 1932. It is the conclusion widely held among experts who have devoted much study to this question, that, in view of the gains of industry through labor displacement, part of these gains should be devoted to the support of unemployment so caused.

Possible Forms Which Protection Against Dependency in Old Age May Take

Since individuals have in large measure found it impossible to avoid destitution in their old age, it is natural that there should be some resort to collective action in order to attempt to soften or distribute or prevent the incidence of age upon economic security. This collective action may take the voluntary form, or there may be a resort to the governmental powers.

Taking up only forms which have been tried: Voluntary action may consist of associations of individuals, who agree to provide financial support for members of their group who become dependent

[1] Source: U. S. Dept. of Labor, Monthly Labor Review, Dec. 1933, Jan. and Feb. 1934.

in old age. This provision is usually incidental to an association formed for another purpose; association for old-age security alone has been tried infrequently and with uniform failure. But trade unions, friendly societies, and fraternal organizations, employees of a single employer have frequently provided old-age benefits. The employer, on his part, may promise old-age benefits to his employees upon their meeting certain requirements. And finally, employees and employers may combine financial resources to that end.

Government intervention has also taken several forms. The State may provide that benefits be paid to the aged directly from the State treasury, with or without a showing of need. Or the State may set up a fund to which it compels employers and employees generally to contribute, and to which it itself may add certain subsidies or direct contributions. Here again there may or may not be a means test. Finally, instead of a single fund for all the insured population, the State may provide for the establishment of several funds which may be segregated along geographical or industrial lines.

Evolution of Old Age Protective Measures

Modern methods of caring for the aged have evolved through a more or less regular development. In no country has a satisfactory method been established at the first trial. In England, for example, the present system of old-age insurance is a development of 300 years' experience with various types of relief measures.

The first method ordinarily employed of caring for the aged has been to regard them as part of the general body of the dependent and to provide for them through general poor laws. In England and in America until recent years these laws contemplated that indigent aged, along with other dependent classes, would be cared for in alms houses. However, from time to time, the aged, along with the other groups, were subjected to the work test so that all the aged except those whose physical condition was very poor were granted only a very meager subsistence, if anything.

With the growth of an industrial economic society it has been gradually recognized that the dependent classes did not constitute one single problem but were in fact several distinct classes, each of which required a specialized treatment. This process, too, was a matter of evolution rather than a sudden realization of the real nature of the problem. For example, in the relatively early stages of the industrial revolution it became obvious that industry was responsible for work accidents, and hence the common law doctrine was modified to take account of the peculiar responsibility of the employer, and to a decree placed upon him the burden of support of persons who became dependent by reason of becoming disabled in industrial accidents. Later this method was modified into a form of direct social insurance. In European countries, at least, the old idea that unemployment was caused mainly by the efforts and the characters of individuals was gradually replaced by a conception that the primary responsibility for unemployment lay with industry itself, and hence, in order to deal effectively with the problem, systems of benefits were required which were not based on the theory that illeness was due largely to the unwillingness of the individual to work.

Along with this change in the attitude of governments toward these problems there was a corresponding change in the attitude of private charitable organizations. There again one finds a specialization of charitable associations, each dealing with a specific part of the problem, or, if covering a wider area, creating an administrative organization which would take into account the varying types of problems involved.

The segregation of the aged from the general body of the dependent has been a part of the general process toward specialization in this field. The exact stage at which this segregation occurs has not been uniform in all countries and the process is not yet completed, but it has been the subject of legislation by virtually every country in the world.

Stages in Specialization

In English-speaking countries, at least, the first segregation of the problem of the aged from that of other dependent persons ordinarily occurred through voluntary action on the part of large employers. While employers have not always been willing to accept the burden, the fact that a large organization is throwing or has thrown its aged employees out of employment when they were without other means has ordinarily resulted in unfavorable publicity and not infrequently in loss of trade. Many employers shared the popular aversion of depriving old men of work when they were without other means of support. Many, therefore, kept their aged employees in active service as long as possible. Later it was recognized that payment of outright pension was more economical than the hidden payment of pensions in the form of unwarranted retention in service.

The size of a particular problem had always a direct relationship to its classification. Since the completion of the early stages of industrial revolution the relative number of aged in the populations of most of the industrial countries has increased rapidly, as has been pointed out above. In agricultural societies the aged are, generally speaking, more useful than in an industrial organization where the regimentation of production and the necessary coordination of many units imposes physical demands upon workers, which the older ones are unable to meet. The increasing size of the problem has thus evoked increasing specialized attention to it.

Railways Ordinarily First in the Development of Voluntary Schemes

In the provision by industrial employers of old-age benefits for their employees, the railroads have, almost without exception, been first in all countries of the world. There are several reasons for this primacy. Railroading was the first industry in which individual business units obtained great size. Railroading also was one of the first industries which itself attained considerable age. Its own age tended to result in an increased age level for its employees. The use of aged personnel, particularly on train and engine crews, and in other crucial positions was unusually hazardous because of the element of public safety in that a single accident might cost dozens or hundreds of lives and involve a great financial burden upon the car-

rier as well. Railways, moreover, have usually been recognized as being affected with a public interest to a unique degree and their relations with their employees have always been a matter of great public interest.

Voluntary pension systems on railroads have appeared in most countries at a relatively early date, for example, in Belgium in 1845, Denmark 1859, France 1856, Italy 1862, Netherlands 1845, Portugal 1877, Russia 1858, Norway 1890, Sweden 1868, Great Britain 1853, Canada 1874, and the United States in 1884. By 1890 the pension systems for railway employees covered substantially all of Europe—virtually a whole generation in advance of similar provision for employees and citizens generally.

In the United States the growth of voluntary pension systems on the railways was relatively slow. Although the first plan was adopted in 1884, the second came into existence only in 1900, and by 1910 there were only twenty plans in existence. The percentage of employees covered by formal pension plans as compared with the total number of employees was three percent in 1890, eleven percent in 1900, fifty percent in 1910, and 82.4 percent in 1927. The last percentage has remained approximately the same to the present day. In addition, a number of other railways pay some old-age benefits on an informal relief basis, where the payment of pension and the amounts thereof are matters of managerial discretion exercised in individual cases. In some form or other, therefore, old-age benefits are paid by railways employing about 94 percent of the total number of railway employees in the United States.

Employers' Reasons for Adoption of Voluntary Pension Systems

In most European countries the social objective of providing for the aged was a prime consideration in the establishment of voluntary pension schemes. It was therefore considered proper that employees as well as employers should contribute to the funds required, and such were the systems generally established.

In the United States, on the other hand, other objectives were deemed more important. Employers thought the payment of pensions to be good business management because it would bring public approval and more business. They hoped that the payment of pensions would improve the morale of their employees and bring increased loyalty to the employer. This improved morale and increased loyalty would, in turn, it was thought, prevent strikes and other labor disturbances. With the increasing recognition of the costs involved in the retention in service of superannuated employees, attention was directed to more tangible advantages. It was recognized that superannuated employees not only lost in their own efficiency but placed a drag upon the entire organization of which they were interdependent units and blocked promotions, with consequent improvements, all along the line of the organization. Automatic retirement of superannuated employees under pension systems was expected to improve efficiency, remove the drag, and open up opportunities for promotion leading, in turn, to increased efficiency and improved employee morale.

Industrial pension systems make no pretense of being aimed at the relief of general old-age dependency. They have been volun-

tarily adopted by employers because of the business advantages expected from them. In the United States organized labor has been apathetic and in some part even hostile to the adoption of voluntary pension systems by industry. Their adoption was brought about without the instigation or demand of labor. And because employers in the United States sought from their pension plans the specific advantages mentioned above, they deemed it desirable to retain complete control and direction of the systems they adopted. For this reason, until recent years, the great majority of the voluntary industrial pension plans were supported wholly by the employers without contribution by the employee. The railroad-pension plans are all of that kind at the present time.

Old Age Benefit Systems Supported by Employees

There have also been some attempts to provide old-age benefits by employees acting together, particularly through their union. All four of the train-service brotherhoods in this country have at one time or another maintained pension plans organized as a department of the national office, which members might join voluntarily upon payment of required contributions. Three of the brotherhoods also organized departments or associations for the payment of old-age benefits to the widows of deceased members and two of the brotherhoods maintain insurance which is payable as an endowment at age 70. Three of the train- and engine-service brotherhoods and two other associations of railway employees maintain other benefits which are used in part to provide relief payments to disabled members.

In addition to these forms of old-age protection there are two homes, one now maintained by three train- and engine-service brotherhoods (formerly all four), the second maintained by the other train-service brotherhood.

The evolution of these trade-union benefits has been in general quite similar to the evolution of protective measures generally. The first step was the establishment of general systems of relief payments, where the relief was ordinarily payable at death. Disability provisions were added some time later. Next came the establishment of the first of the two homes which were for the general purpose of caring for disabled members, disability from old age being included. Although taking all the unions together the pensions systems seem to have been the next development, for any individual union the next step seems to have been the adoption of a plan for payment of the death benefit or an endowment at age 70. Finally, there came the specialized pension system directed solely to the payment of benefits to persons who retired from the service of a railway because of age or permanent total disability. At the peak of the development of these plans about 475,000 railway employees were covered under one or another of the various benefit forms.

In addition to the efforts of employees to provide for themselves old-age benefits through their labor organizations, a few employee mutual benefit associations have provided retirement allowances and in two or three instances the employees of a single road have organized a voluntary old-age pension system without the sickness and death benefits ordinarily provided for under the mutual benefit associations.

Inadequacies of Employee Association

In no case has the provision for the aged of these voluntary forms been adequate, either as to particular individuals who are awarded benefits, or as to the proportion of the persons in the industry who have benefited.

The experience shows rather conclusively that employees without assistance are unable, even collectively, to provide any adequate amount of old-age benefit. Generally speaking, only the four most prosperous unions in the railway field have even attempted to provide regular pension plans. These were never successful even in enlisting the support of more than a minority of their own members; were never actuarially solvent, and have in several cases already been closed. Those which continue to operate are favored by relatively low age distribution or else have been compelled to reduce benefits drastically. Total payments under the pension schemes fell from about $2,060,000 in 1928 for the three train-service brotherhoods which still maintained plans at that time to $1,375,000 in 1933.

Employees not organized into trade unions have on the whole been unwilling to attempt collective action for old-age support. In connection with the mutual benefit associations the propriety of an old-age benefit has always been open to question, and the associations have been unsuccessful in handling old age. Two specific old-age systems only have been attempted, and one of these has now been compelled virtually to suspend, although the benefit promised was never adequate. The other system was unable to enlist the support of even more than a small proportion of the personnel of the particular carrier.

Inadequacies of Employer Plans

Although the voluntary industrial pension movement has had a history of half a century on the railroads, the experience has been largely unsuccessful. In addition to the general disadvantages already mentioned, namely, the inadequacy of benefits and the narrow scope, the employer systems have introduced other disadvantages. First, by reason of the imposition of long service requirements, and the fact that upon a separation from service no employee retains any rights to receive a pension, distinct inequalities have arisen between different groups of employees as to their likelihood of receiving a pension. Second, the method of determining the pension has been such as to favor certain classes as against others. Third, failure on the part of the carriers to provide any funds has made it inevitable that sooner or later the voluntary systems would face a serious crisis. Fourth, the terms of the plans were such as to offer no legal security whatever. Finally, the plans have failed to remove a reasonable part of the superannuation of employees so that the railway industry, although more extensively covered by voluntary pension plans than any other single industry in the United States, nevertheless has a larger proportion of aged employees than any other, and the plans have finally tended to break down, both as to the operation of retirements and as to the amounts of benefits paid at the most crucial time.

In preparing this part of my statement, I have drawn not only upon my experience but particularly upon studies prosecuted by the Section on Labor Relations of the staff of the Federal Coordinator of Transportation. I was directly in charge of these studies and supervised the collection and analysis of the information procured. One study consisted of the collection and analysis of the employment histories of 400,000 railroad employees engaged in active carrier service in the period 1924 through 1933. The histories were taken from the records of fourteen carriers. For each of these employees we secured the date of birth, the date of original entry into service, sex, occupations held (with dates), absences or separations from service (with causes and dates), service records on carriers other than the one from which the record was taken, rates of pay and annual earnings from 1924 through 1933. The other study consisted of the collection and analysis of the records secured from reports by all railroads which maintained formal pension plans, of all persons pensioned under those plans. The number of such persons for whom reports were received was 110,000. The reports gave for each pensioner the sex, date of birth, length of service credited toward pension, date of retirement (with cause), amount of pension originally received, amount of pension received at date of death or on December 31, 1933, date of death or date of removal from the pension rolls for other cause (with cause).

Inadequacy of Benefits

Of the 50,216 pensions in force on December 31, 1933, of which record has been obtained, in 25 percent the payments were less than $30 per month. The average for the entire number was approximately $54 per month. Only 2.6 percent of the payments exceeded $100.00 per month, and only 1.2 percent exceeded $125 per month.

Inadequacy of the Coverage—Probability of Receiving Annuity

At no time were there more than 83 percent of the railway employees covered even theoretically by formal pension plans. But merely to speak of the coverage of pension plans in terms of employees in the industry exaggerates their effectiveness in actually providing benefits. An analysis made by me of the records of 400,000 railroad employees during the period 1925 to 1928, as described above, indicated that of employees entering the service of the railways only 17 percent would ultimately qualify for a pension. This percentage was made on an intentionally conservative basis for the purpose of future projections of costs (the depression years with the great reductions in forces being disregarded for the purpose of these projections), and it exaggerates materially the actual number of persons who have entered the service of railways while existing plans have been in effect and who actually had or would receive a benefit under the railways' pension plans.

The cause for this small probability of receiving an annuity under the railroads' voluntary pension plans is to be found in the rules of eligibility prescribed in such plans. Practically all of these pension plans authorize the payment of pensions only to those employees who

have been *continuously* in the employ of the carrier for a certain period of years, fifteen, twenty, or thirty. All the pension plans authorize the payment of a pension only to those employees satisfying the continuous service requirement who are still in the employ of the carrier at the retirement date. Provisions that persons who leave the service of the carrier thereby relinquish all claims to pension allowances are standard in the railway pension plans, as is the provision that if such persons reenter the service subsequently they shall be considered for pension-record purposes as new employees. Provisions are also to the effect that absence for more than one year shall be considered a break in the continuity of service, even though such absence was by leave or due to furlough or lay-off. Because of these requirements as to first length of service, secondly, employment up to the date of retirement, and, thirdly, continuity of service, the number of railway employees eligible to retirement under the voluntary pension schemes constitutes a small percentage of the total.

Mention has already been made of provisions in pension plans and employment rules fixing a maximum hiring age for experienced and inexperienced employees. Provisos are commonly annexed to such rules permitting the employment of persons over the fixed maximum upon the understanding, or in writing, that such persons are employed without any eligibility to pension benefits. This factor again tends to reduce the probability of a railway employee's receiving a pension under the existing systems.

Discriminatory Features

Small as is the likelihood of any individual employee receiving an annuity, the probability varies greatly as between the different classes. For example, in the train and engine service the probability of receiving a pension ultimately appears to be approximately 30 percent, or 50 percent greater than that for the clerical forces generally; twice as great as that for the agent, towermen, and telegraphers group; about 3½ times as great as that for persons in the maintenance service; and about four times as great as that for other miscellaneous classes of employees. A more detailed classification would reveal far greater discrepancies between the several classes.

The above calculations are based on a projection of experience which obtained in the period of 1925 to 1928. Putting the matter in another way, the actual number of retirements in twenty-one classes of employment in the period 1924 to 1933, inclusive, may be compared with the average numbers on the pay rolls of carriers in the same period and for the same classes. The proportion of retirements in the several groups for these twenty-one classes, relative to the average number of employees, is given in the following tabulation:

Occupation	Percent of retirements
Executive and Managerial Officer Group, Official Supervisory Group	9.6
Subordinate Officer and Supervisory Staff, Assistant Group	6.5
Gang and Section Foreman Group	9.2
Professional, Sub-Professional, and Technical Group	0.6
Clerical and Office Group	2.4
Office-Attendant Group	2.1
Agent, Telegrapher, and Towerman Group	5.5
Train-Dispatcher Group	5.4

Occupation	Percent of retirements
Skilled-Craftsmen Group (Maintenance of Equipment and Stores)	3.9
Skilled-Craftsmen Group (Maintenance of Way and Miscellaneous Departments)	3.7
Semi-Skilled, Helper and Learner Group (Maintenance of Equipment and Stores)	1.8
Semi-Skilled, Helper and Learner Group (Maintenance of Way and Miscellaneous Departments)	3.4
Manual-Worker Group (Maintenance of Equipment and Stores)	2.6
Manual-Worker Group (Maintenance of Way Department)	1.3
Manual-Worker Group (Station Platform, Warehouse, Dock, and miscellaneous departments)	2.9
Train and Engine Service Group A	12.7
Train and Engine Service Group B	2.3
Floating Equipment Service Group A	3.5
Floating Equipment Service Group B	
Floating Equipment Service Group C	
Train Attendant Group	2.8
Patrolman and Watchman Group	12.4
Miscellaneous Worker Group	0.5

The above tabulation shows definitely that certain important groups of employees, such as section laborers and the lower paid employees generally, have far less chance of benefiting from the voluntary pension systems than have other more highly paid classes of employees. Great as are the discrepancies in this tabulation, the range and dispersion are understated because of the variations in the rate of labor turnover. In the lower paid groups, generally speaking, the turnover is highest, and therefore the average understates the actual number of persons engaged in the service relative to the total.

Inequalities in Amount of Annuity

Under the voluntary plans the amount of annuity is calculated by multiplying the number of years of service by the average pay during the last ten years of service. The number of years of service is, with one or two exceptions, not the total number of years of service with the carrier, but the number of years of continuous service. This definition of service militates severely against certain classes, particularly in the maintenance services where the turnover is high, seasonal employment is prevalent, and where the last strike of national consequence occurred. The average periods of service credited under the plans for the twenty-one classes of retired employees are given in the tabulation below:

Occupation	Average years of service
Executive and Managerial Officer Group, Official Supervisory Group	40
Subordinate Officer and Supervisory Staff, Assistant Group	37
Gang and Section Foreman Group	35
Professional, Sub-Professional, and Technical Group	32
Clerical and Office Group	35
Office Attendant Group	34
Agent, Telegrapher, and Towerman Group	37
Train Dispatcher Group	36
Skilled Craftsmen Group (Maintenance of Equipment and Stores)	34
Skilled Craftsmen Group (Maintenance of Way and Miscellaneous Departments)	32
Semi-Skilled, Helper, and Learner Group (Maintenance of Equipment and Stores)	32
Semi-Skilled, Helper, and Learner Group (Maintenance of Way and Miscellaneous Departments)	31

Occupation	Average years of service
Manual Worker Group (Maintenance of Equipment and Stores)	29
Manual Worker Group (Maintenance of Way Department)	29
Manual Worker Group (Station Platform, Warehouse, Dock, and miscellaneous departments)	31
Train and Engine Service Group A	39
Train and Engine Service Group B	35
Floating Equipment Service Group A Floating Equipment Service Group B Floating Equipment Service Group C	35
Train Attendant Group	31
Patrolman and Watchman Group	32
Miscellaneous Worker Group	30

The average pay during the last ten years of service is frequently calculated by dividing by ten the total earnings during the period, thus the larger the proportion of absences the smaller the average would be. This method of calculating tends again to reduce the annuity of the lower-paid personnel who generally performed the types of work requiring the greatest physical exertion relative to the higher.

The typical trend of wages according to age varies very considerably between the several classes of employees. In the executive and supervisory group, and to a certain extent the clerical group, and in the train and engine service, the annual earnings generally rise throughout most of an employee's service. On the other hand in the station agents, towermen, and telegraph operator group, the maintenance services, and the miscellaneous groups of employees, maximum earnings generally are made from 40 to 50, with a downward movement thereafter. The average pay during the final ten years of service for the executive, clerical, and technical group is about 40 percent greater than the average pay throughout the whole period of service. For train and engine employees the average pay for the last ten years runs about 15 percent higher than the average pay throughout the whole period of service, while in the other classes the average final pay runs below the average for the whole period of service. Thus, the method of calculating the annuity of the final years of service alone favors the higher-paid employees about 50 percent as compared with the lowest-paid employees. The distribution of the pension payments among the 21 classes of employees, as found in the study above described, is given in the following tabulation:

Occupation	Average monthly annuity
Executive and Managerial Officer Group, Official Supervisory Group	$186
Subordinate Officer and Supervisory Staff, Assistant Group	77
Gang and Section Foreman Group	49
Professional, Sub-Professional, and Technical Group	57
Clerical and Office Group	47
Office Attendant Group	37
Agent, Telegrapher, and Towermen Group	51
Train Dispatcher Group	75
Skilled Craftsmen Group (Maintenance of Equipment and Stores)	47
Skilled Craftsmen Group (Maintenance of Way and Miscellaneous Departments)	40
Semi-Skilled, Helper, and Learner Group (Maintenance of Equipment and Stores)	38
Semi-Skilled, Helper, and Learner Group (Maintenance of Way and Miscellaneous Departments)	31
Manual Worker Group (Maintenance of Equipment and Stores)	29
Manual Worker Group (Maintenance of Way Department)	25

Occupation	Average monthly annuity
Manual Worker Group (Station Platform, Warehouse, Dock, and miscellaneous departments)	30
Train & Engine Service Group A	76
Train & Engine Service Group B	50
Floating Equipment Service Group A	57
Floating Equipment Service Group B	
Floating Equipment Service Group C	33
Train Attendant Group	29
Patrolman and Watchman Group	29
Miscellaneous Worker Group	

Financial Security

Despite the rapid growth of the payment of pensions and the demonstrated probability that this growth will continue for a long period of years, the railways, generally speaking, have failed to make any adequate provision for accumulating funds. Rather they have elected and are continuing to charge the payments into operating expenses each year as the payments are made.

One carrier for three years set aside as a reserve the present value of the annuities during those years, while another created a trust fund from its surplus and maintained it as an amount equal to the value of the pensions in force. But no serious effort has been made by other carriers to secure the solvency of their pension systems. This policy of the railroads has been in sharp contrast to the policies pursued by other large American corporations which have maintained voluntary pension plans similar in character to those maintained by the railroads. By one means or another in the period since 1920, funds in excess of $600,000,000 have been accumulated, and the accumulation has proceeded even during the depression. A number of large companies made heavy charges against their surplus accounts in setting up more or less adequate reserves. The railroads, however, seem to have preferred to maintain large dividend payments to their stockholders and to conserve surplus rather than to lay any funds aside for pension purposes. This failure to provide and to adopt a reasonably adequate financial program was an important contributing factor in leading employees to view with decided skepticism the value of the pension offer made to them by their employers.

Legal Uncertainties

The typical railroad plan specifically reserves the right to reduce annuities or discontinue them entirely, to amend, and to abolish the pension plan at any time when the railroad corporation deems it appropriate. These reservations are in the printed terms of the plans which are ordinarily handed to employees and would therefore probably be the crucial factor in determining the rights of the employees under the plans. A typical provision, which, with variations of unessential language, is found in nearly all railroad pension plans is the following:

"The establishment of this pension system is intended only to declare the present policy of the Company, and to give authority and instructions to the officers of the Company to carry out this policy; and neither the establishment of this system nor the granting of a

pension, nor any other action now or hereafter taken by the Board of Pensions or officers of the Company shall be held or construed to create a contract or to give any officer, agent, or employee of this Company a right to be retained in its service or any right to any pension allowance, the Company hereby expressly reserving the right at any time to discharge any officer, agent, or employee, and to terminate the pension system or any pension or pensions previously allowed, or to modify the pension system in any respect, either generally or in its application to any specific case."

Only one railroad, and that a relatively small one, wrote into its plan a guarantee that once an annuity had been granted the company would continue the payment of benefits for the life of the employee. This guarantee seems to have had no value since, notwithstanding the language, benefits were, in fact, reduced. Some railroad plans fail to make any mention of the noncontractual features, but most of these are plans of a more or less informal nature, under which, in any event, employees have no legal security.

Here again the policy of the railroads presents a distinct contrast to the practices of other industries. Although in the early history of voluntary plans the pension systems generally followed the lead of the railroads, there has been, particularly since 1920, a distinct change. Along with the accumulation of funds the companies in other industries have tended to guarantee at least that once the payments of annuities have been started, employees will under no circumstances be deprived of them, nor will such annuities be reduced. By the end of 1932 almost 50 percent of the plans in industry other than railroads provided some form of legal guarantee to pensioners.

The Crisis of Voluntary Pension Plans

It has already been shown that the voluntary railroad pension systems made no provision for the vast majority of railroad employees in their old age. A large part of this failure was attributable to the fact that many employees left the service of the carriers for one reason or another prior to qualifying for a pension. In a considerable number of cases, however, employees qualified as to age but were unable to meet the service requirements. Data have been collected in the course of the studies above described as to the number of persons compulsorily retired at age 70 only, solely through the operation of the voluntary pension plans, and yet without pension on the Class I carriers in the years 1929 to 1933, inclusive. These figures were as follows:

1929	779
1930	925
1931	1,206
1932	1,069
1933	955
Total	4,874

These data omit those retired at other ages without annuity; doubtless a considerable number. On the basis of incomplete returns to the Railroad Retirement Board, there were at least 1,458 employees, aged 70 or over, who were retired without pension from the service of class I carriers from June 27, 1933, to about September 15, 1934.

Despite the pension systems and perhaps largely because of the service requirements and consequent failure to make retirements, the operation of the systems has not resulted in any great lightening of the burden of superannuation on the carriers. In most industries other than railroads a considerable portion of the pension plans provide for the compulsory retirement of employees at age 65, regarding that age as the point marking off the superannuated from the body of employees whose services may be utilized with full advantage. The trend in these other industries has been away from compulsory retirement at age 70 to compulsory retirement at age 65 insofar as there is any provision for compulsory retirement. Generally speaking, in the heavy industries, at least, and certain others, notably the telephone industry, 65 is coming to be regarded as a desirable maximum age limit for employment.

As compared with a number of heavy industries, the proportion of persons 65 and over in the railroad industry seems heavy. According to the census of April 1, 1930, 3.43 percent of steam railroad employees were 65 or over. This compares with 2.26 percent in coal mining, 1.50 in oil wells, 2.83 in the chemical industry, 2.61 in iron and steel, and 2.27 percent for transportation other than railroads.

It is true that there are a number of industries in which the proportion of employees over 65 is greater than railroads, for example, in trade, leather, clothing, and in parts of the building industry. All these, except the building industry, are regarded as rather light industries, and in building there are many jobs where skill is a predominant factor and the heavy tasks may not fall to the lot of the older persons. In the heaviest end of the building industry, i. e., the building-trade laborers, the proportion of persons 65 and over was, on the census date, much less than 1 percent of the total number of such employees.

Moreover, taking the age distribution throughout an entire group of employees, the typical railroad employee, on the census date in 1930, was about four years older than the typical employee in all mechanical industries; over seven years older than the typical employee in all industries other than the railroads; and eight and one-half years older than the typical employee in transportation and communication other than railroads. The comparison, if made at present, would undoubtedly show an even wider discrepancy. Thus, serious as is the existing situation with respect to superannuation on the steam railroads, the indications are that it will become progressively more serious unless the retirement rate is speeded up.

In the face of this progressively increasing burden of superannuation, the trend of retirements made by the railroads has turned down after a long period in which retirements were steadily increasing. The peak was reached in 1931 when, according to available records, 7,417 were retired on annuity. This represents but a slight increase from the preceding year. In 1932 the number of retirements dropped to 7,330, and in 1933 to 5,694. The rate of retirement in 1934 was even lower than 1933. Some carriers have been making retirements as usual, a considerable number have made large reductions, and at least one has made no retirements since 1930.

Not only have retirements been declining but also reductions have been made in the amounts of annuities. Of forty-seven formal and

semiformal railway pension plans, thirty-five have reported reductions in the amount of pensions to some or all pensioners. The total annuities being paid to the 50,216 pensioners, according to the records obtained as of the end of 1933 in the studies above described was $2,692,662.07 per month. The amount of pensions originally granted to these 50,216 employees was $2,942,722.54, a reduction of approximately 8 percent. The variation in reductions as between the several carriers is rather large, ranging from as little as 1 percent in some cases to as high as 40 percent in others. Although benefit payments in 1932 were smaller than in 1931, 1932 being the year in which the reductions were made, the total payments in 1933 exceeded those of any preceding year, so that despite the slowing down of retirements and the reductions in annuities, the burden of payments was not decreased. The railway pension systems, therefore, were facing a crisis with a threat of a break-down which was becoming increasingly more probable. They were threatening to break down at precisely the time when they were most needed.

The trend of events in the United States as regards old-age protection has therefore followed a course similar to that in other countries. Various devices have been tried in an attempt to discover a reasonable solution of the problem of old-age dependency, and these having proved inadequate, an attack was made on a fresh line. Voluntary systems have generally proved inadequate in Europe, as well as in other countries. So, also, they have proved inadequate to cope with the problem in this country, and it was inevitable, therefore, that there should be an attack made on the problem from a new angle here.

Government Action

Just as has been the case with a number of other countries, the first State approach to the problem of old-age dependency in this country has been provisions now adopted in twenty-eight States and two territories in which citizens, usually age 70 or more, who fill certain residence qualifications, may be granted an allowance which ordinarily may not exceed one dollar per day, or an amount sufficient to bring the total income up to that point. These systems have been in operation for relatively a short time, although in some states there has been an experience of about ten years. As has already been indicated, the total number of persons who were receiving such benefits in 1933 numbered about 115,000. For receipt of benefits the qualifications require that the beneficiary be in possession of a very small income, that he have no family or kin against whom the State may bring suit to compel support, and, generally speaking, if the applicant is in possession of any property he must assign it to the State. The benefits actually granted have been small, the average benefit at the end of 1933 standing at about $18.75 per month, and ranging from $7.28 to as high as $30.00. The amounts of the annuities have been declining, the average in 1932 having been $19.38 a month, as compared with $18.75 in 1933. The amount of pension in New York State, where almost half of the pensioners reside, declined from almost $27.55 in March of 1931 to $20.58 at the end of 1933, a drop of over 25 percent. The number of pensioners in that State, moreover, declined from 54,085 at the end of 1932 to 51,106 at the end of

1933. This experience with old-age pension systems on a relief basis in the United States is typical of that of other countries. The International Labour Office, after a world-wide study of this type of pension system, arrived at the following conclusions:

"To judge by events in the last few years, it would appear that noncontributory pensions constitute not a permanent but rather a transitional measure, destined, sooner or later, to make way for pension insurance.

"The cost of pensions tends continually to rise, partly because of the increase in the proportion of the aged in the population and partly because of the pressure which is always being exerted in favour of higher pensions, greater exemptions, and lower pensionable ages; consequently, Governments find themselves after a time burdened with a much greater charge than was anticipated at the time when the pension was first adopted. In order to lighten their burden they introduce pension schemes based on compulsory insurance; in exchange for his contribution the insured person is offered a pension free from any condition as to means and sometimes also at a lower pensionable age, while widows may become entitled to a pension whether they have dependent children or not."

Thus, the movement toward the enactment of old-age insurance in the United States, evidenced by the passage of the Railroad Retirement Act, is directly in line with the trend of similar legislation in other industrial countries.

Moreover, there are precedents for the separate treatment of railway employees. In England, apart from the general system of old-age insurance, Parliament has enacted into law the retirement systems of English railways. There is a special railway retirement system for French railway employees, and special legislation also in Argentina, Canada, Cuba, Paraguay, Brazil, and Uruguay. The last two countries covered other public-utility employees as well as steam railways.

Analysis and Summary

A study of the theory of pension systems and of the experience with the plans which have been adopted justifies a statement of quite definite conclusions. Quite apart from the social objective of relieving destitution of the aged, retirement and pension systems have several other functions. That the retirement of superannuated employees on pension allowances is in the interest of good business is proved by the wide-spread voluntary adoption of pension plans in industry and by specific studies which have been made in particular businesses before and after the institution of pension plans. Tangible economies in the way of pay-roll savings and the promotion of efficiency have been definitely apparent. Quite as apparent but less ponderable have been the intangible advantages and economies sought from pension plans through the improvement of employee morale, of labor relations, and public favor. Stabilization of employment not only through the reduction of labor turn-over in particular organizations but also through the establishment of a routine and automatic manner by which old employees are retired and opportunities opened for the employment of younger unemployed persons is a larger social objective at which pensions may be aimed.

Further social gain is derived from pension systems in their maintenance of the purchasing power of the employees retired from service and in the consequent tendency to reduce the fluctuations in purchasing power and the consequent effects upon business.

Experience has proved, however, that the gains experienced from pension systems cannot be achieved simply through voluntary action. Because of the inadequacies and limitations in the voluntary systems established in industry pointed out above, the achievement of many of the gains expected has been hampered and in some instances defeated. For the attainment of the desirable ends a compulsory system without the limitations of the voluntary plans seems to be essential.

First of all, the system must be obligatory upon the employer so long as the employer retains complete control and direction over his pension plan and so long as the employer retains complete power to terminate or reduce pension payments or pension eligibilities, improvement in employee morale and in labor relations can hardly be expected. Secondly, retirement should be automatic in order to avoid not simply actual discrimination but, even more, the appearance of discrimination in the eyes of the employees subject to it. Thirdly, pension rights should be credited for service whenever performed, regardless of the length of such service and regardless of whether or not the employee is in service at the time of retirement. The loss of pension rights by separation from service for various reasons and the requirement of a fixed length of service for eligibility to pension tend to make employees skeptical as to the ultimate benefit they will derive from a pension system and tend further to interfere with employees' opportunities to better their positions by changes in occupation. This interference in turn tends to create resentment in the employees, which may offset the possible improvements in morale and loyalty otherwise expected. Fourthly, for similar reasons pension credits should be permitted to accumulate regardless of change of employers. And fifthly, for the reasons detailed below, the contributions of employers in an industry should be pooled in a common fund.

The Railroad Retirement Act

1. *Definition of "employee."*—Records of individual railway employee histories, compiled in the studies above described, indicate a rapid change of employees from one job to another. Moreover, the necessity for flexible organization requires rapid shifts in the duties of those holding the same position. The provision for old age is essentially a long-time, saving process. In order to arrive at a satisfactory basis for computing costs and determining amounts of annuities it is essential that there be some stable basis on which to make calculations. Any attempt, for pension purposes, to segregate groups of employees or time spent by individual employees on the basis of the classification employed in the affidavit of Dr. Parmelee, verified September 17, 1934, would be an almost impossible task and would involve expense which would probably exceed any benefit to be derived therefrom. If it were necessary to divide down salaries, wages, and service periods, according to time spent on the basis of that classification, no stable basis for the computing of annuities and

pension costs would exist. The actuarial, financial, and planning work of the Board would thus be materially hampered. The carriers themselves do not, and probably cannot, keep records on the basis of that classification. It is impossible to conceive that an obligatory system of old-age insurance for railway employees which omitted all the time of certain employees and part of the time of other employees would be administratively or financially feasible.

The coverage of employees who were in railway service within one year prior to the enactment of the Act rests on the pragmatic facts of the industry. The railroad industry is peculiar in that when employees are furloughed or laid off by reason of lack of work, their names are retained on a list by the employer and, generally speaking, they are recalled into the service in a definite, fixed order. In certain classes of service, moreover, employees not actually at work are subject to call at all times and at all hours, and to hold themselves in readiness for railroad service in preference to securing other employment. Moreover, under a very large number of agreements between employee organizations and the carriers, the furloughed employees have contractual rights to be called back into the service in preference to any other person and in a certain order. Such furloughed employees are generally regarded as employees and in many cases are permitted to continue as members of mutual benefit associations, to contribute to group insurance systems, and to continue to use free passes over the lines of their employers as well as over those of other carriers. This last privilege has a fairly considerable monetary value.

The terms of employee contracts with carriers vary widely. In some cases rights of recall may be maintained only six months; in other cases they may be maintained for a year, or a year and a half, and in some cases more or less indefinitely. Where no contract exists but employers maintain seniority lists and extra boards, names may be taken off the list as soon as an employee is furloughed, or once every six months, or annually, or at infrequent or indefinite periods. In any event there is always a body of employees not actively engaged in railway service who regard themselves, and for most purposes are regarded by the carriers, as employees and who would ordinarily be reemployed. It is entirely natural, therefore, that the provisions of a retirement act should be applied to that body of employees. Difficulty arises in attempting to determine who are and who are not employees on the basis of retention of seniority rights, or rights of recall, as was attempted in the earlier drafts of the Retirement Act. Any definition drawn in such terms would have widely varying results as between members of various employee organizations and as between carriers. In order to be equitable as to all employees and carriers, some uniform rule is reasonable and necessary. While many carriers revise seniority lists and rights to recall after shorter periods, one year seems a reasonable approximation of the duration of such rights.

Without some rule such as this, a considerable number of railway employees who were in active service in the year prior to the enactment date of the Act but who for one reason or another were not in active service on that date, though justifiably having every reasonable expectation of returning to active service, would, as a practical

matter, be subjected to the very real danger of being permanently barred from railroad employment.

2. *Amounts of annuity.*—It is not possible to say at the present time what relation annuities will bear to the average pay throughout the period of service, or the pay in any other particular period. The relationship will not be the same initially as it will be later on, by reason of the effect of the prior service credit. For persons retiring initially at ages 65 and over it now seems likely that the retirement annuity will average about 50 percent of the final pay in the last ten years of service, this average being the most widely used method of computing pensions under the voluntary plans in American industry. The average length of service of such employees will probably be in excess of 35 years, so that the average amount of annuity would probably not be far from 1½ percent of the final average pay for all years of service. This percentage of final average pay is approximately the average for voluntary industry plans in other countries. Relative to pay, the annuities provided under the Railroad Retirement Act are not equal to the annuities which American Industry has provided for its employees voluntarily.

The maximum annuity payable under the Railroad Retirement Act is $120 per month, which is lower than the maximum provided in about 75 percent of the voluntary plans. There is, moreover, no provision for a minimum benefit, which is contained in about 68 percent of the voluntary plans.

For retirements to be made in the future, the relationship of annuities to the average final pay will probably be, on the whole, rather lower than will be the initial percentage by reason of the reductions in the level of pay during the last few years, and because the average compensation on which the annuity will be calculated will be that over the entire period of service rather than the last few years. It is probable that eventually the level of annuities payable under the Railroad Retirement Act for persons who have served for long periods on the railroads and who remain in the service until retirement will tend to be lower than the pension provided under voluntary industry plans in this country.

The typical industry pension plan in the United States is still one in which the employer pays for the total cost. Although there has been a rapid growth of contributory plans in recent years, a considerable majority of employers under voluntary plans still pay most contributions. Under the Railroad Retirement Act the employees will pay one-third of the whole cost, so that, so far as the carriers are concerned, the level of annuities payable by their contributions is lower than that for voluntary pension plans by an appreciable degree. For the typical employer, moreover, the level of annuities under the Railroad Retirement Act is lower than the level of annuities will eventually be under the Civil Service Disability and Retirement Fund of the federal government.

3. *The Cut-back.*—The Railroad Retirement Act permits employees to retire before the age of 65 if and when they have completed thirty years of service. If an employee retires under this provision, his annuity, if payable immediately, is to be reduced by one-fifteenth for each year by which retirement precedes age 65, except in cases where retirement is due to physical or mental inability to continue in service. This provision gives recognition to the fact that the cost

of making retirements before the normal age is greater than that of the normal age, by reason of greater longevity, shorter periods of contribution, and, under a reserve basis, the shorter accumulation period.

The provision for paying full annuities to persons retiring on account of separation from the service by reason of permanent inability to continue in that service is equitable since in most cases there would be severe impairment of life with resulting curtailment of the life span, so that no extra cost would thereby be incurred unless administrative control is unnecessarily relaxed.

No annuity is payable for retirement before 65 unless the employee has completed 30 years of service. Insofar as the cut-back applies, the effect on cost will be slight, and there may actually be some gain from earlier retirements.

The 30 years' service requirement for early retirements before age 65, insofar as it affects retirements by reason of permanent incapacity to continue in the service, is distinctly longer than that now required on the railroads themselves. The provisions in the railroad voluntary plans are that employees may be retired on pension for disability after 25 years of service, or even less. In other industry groups the usual service requirement for disability retirement on pension is 20 years.

4. *Prior service.*—In a considerable number of contributory pension plans established voluntarily by industrial organizations in the United States in the last few years, the great majority provide that employees will receive credit for services rendered prior to the initiation of the plan. This provision is included, of course, in order to provide retirement incomes in the near future which will be sufficiently large to enable retirements to be made without friction, thus to achieve pay roll savings, and help the morale of the employee group, making room for promotions, and generally to achieve desirable ends. This form of calculating the amount of benefit is arbitrary, but has been generally accepted as an equitable method of determining the relative amounts of pensions which are payable to employees. The same result could, of course, be achieved by a number of other methods.

With exceptions so few as to be of small consequence, the employers have assumed the burden of prior service costs. This burden is, generally speaking, annually for a number of years at least, equal to or greater than the cost in respect of services currently rendered, so that during the period in which the accrued liability is funded, at least, the contribution of the employers under contributory plans are as much as twice and frequently more than three times the contributions of the employees. The aim and purpose in some cases is that eventually the costs will be divided about equally between the employees and the employer. This stage, however, has not yet been reached in voluntary plans and is probably some years distant in the future. Moreover, taking American industry as a whole, even yet employee contributions amount to only a rather meager part of the total pension costs now accruing. Under the Railroad Retirement Act employees will be bearing a larger share of the pension cost than in any other American industry.

5. *Payment of annuities to all employees.*—The Railroad Retirement Board interprets the Railroad Retirement Act to provide that

annuity payments must be made to all employees subject to the Act, irrespective of their length of service and regardless of whether or not they are in service at the retirement age, provided, of course, that no person may draw both annuity and pay from a carrier at the same time and that the amount of the annuity is dependent in part upon the length of service.

As has been pointed out, one of the chief defects of the voluntary plans has been the fact that they have provided old-age income for relatively few of the employees who have served on the railroads. A considerable body of employees transfer with more or less frequency from one industry to another so that if payment of annuities is contingent upon long service with a single industry the old-age income will still be far from providing incomes for all employees. It is a reasonable plan to provide that each industry assist in providing an old-age income, dividing the total cost in a ratio equal to the length of service period in each of the several industries. This is the tacit assumption behind the annuity provisions of the Railroad Retirement Act.

At the present time there is a widespread interest in a national system of retirement annuities, and it is altogether possible that some plan for providing such a national system will be enacted into law at an early date. In anticipation of such a system it is logical and necessary that any system of retirement annuities formulated in advance of such a national system be so formulated as to fit into a national scheme with as little friction as possible. The present railroad retirement system is so constituted that it could easily fit into such a scheme, even though the details of that other scheme might not necessarily be identical with the Railroad Retirement Act.

Where annuities are payable only to persons who serve a long period of years or attain a certain age in an industry, there is always an incentive to attempt to avoid liability by dispensing with the services of employees just before they qualify under whatever specifications are fixed. This holds true irrespective of where the line may be drawn, and if any such result is to be entirely avoided the only possibility is to dispense with all artificial barriers whatsoever. Finally, one of the most beneficial results which may come out of a system of retirement annuities, or any other form of social insurance, is an enhancement of the feeling of security of the employees. Undoubtedly one of the most effective ways of reducing costs of production is to give the employees a feeling that their future is reasonably secure. If the threat that loss of jobs with the railways would mean loss of old age income constantly hangs over the carrier employee's head, the feeling that old age income is secure would largely disappear, and one of the greatest advantages of old age insurance would be lost.

6. *Pooling.*—The general question of pooling has three aspects. On the one hand, it may mean merely the pooling of funds. Second, there is involved the assessment of a uniform rate of contribution relative to some arbitrary standard, irrespective of what differences there may be between a risk involved in insuring a particular carrier. Third, there is the use of service with all carriers to determine the amount of annuity. All these three aspects of pooling are involved in the Railroad Retirement Act.

The pooling of funds is the ordinary and logical consequence of insurance. Whenever an industrial organization insures a voluntary pension plan with a commercial company, the funds which it pays to the insurer are mingled with the funds of other companies and in the event that payments by single companies are insufficient to meet its own liabilities, but there is a general surplus, that surplus is drawn upon to meet the deficit of the first company. It would be possible, of course, to set premiums so high that the account of each insured company would show a surplus, but this procedure would involve large costs and would be financially and economically wasteful. The risk of a loss in the account varies inversely with the size of the insured company, and admittedly it is possible that there would be no great danger if the funds for certain large railroads and other carriers were kept separate. Nevertheless, in point of numbers of carriers, this would be untrue, and, in any event, individual firms, would presumably be called upon to make up deficiencies in other funds so that the smaller carriers would be in certain cases undoubtedly penalized, and in other cases undoubtedly beneficiaries.

In commercial insurance, pooling of funds is ordinarily coupled with an attempt to assess premiums which bear some relationship to the risk involved insofar as such risk is subject to quantitative measurement. For example, the premium required to provide old-age benefits on a reserve basis is much greater at age 45 than at age 25, and a company with a low-age distribution has a lower cost than a company with a high-age distribution. The assessment of premiums for old age on an individual company basis has had, generally speaking, unfortunate social consequences under voluntary plans, and would undoubtedly have the same general results, perhaps intensified, under systems of compulsory insurance. If, for example, each carrier were assessed on the basis of age distribution, there would be every incentive to institute low maximum hiring-age limits, since so far as such limits result in low-age distribution, costs would be reduced. It would also encourage high labor turn-over, particularly at the middle ages, in order that such persons might be replaced by younger employees, probably at lower salaries, both by reason of lower pay and younger age reducing costs. Moreover, since longevity after retirement is a prime factor in costs, and since longevity after retirement is to a considerable degree a function of severity of employment conditions during active working life, the incentive toward improving working conditions would be somewhat decreased. The higher mortality rate before retirement would also lower costs, which would again be an influence in the same direction. All the motives toward economy in the operation of individual old-age insurance schemes, with the exception of administrative expenses, are motives which run counter to generally accepted social principles and might well, therefore, be avoided insofar as possible.

The motives toward restriction of hiring-age limits and encouraging turn-over are, of course, not entirely absent from any retirement insurance system where a single industry is a basis; nevertheless, the reductions in cost resulting from an adoption of these practices would be somewhat small for an individual company and much less direct, and consequently the probability of their adoption would be materially reduced.

There are strong social sanctions, therefore, for the assessment of carrier contributions on a uniform basis. Moreover, there is strong reason to doubt whether, after the first few years of the operation of the Act, or, indeed, at all, there would be any marked difference in the level of costs as between the several carriers in the absence of arbitrary restrictions imposed by themselves on employment. The railway net of the country has stood with very little total change for over a quarter of a century. The employment conditions of many carriers have been given a considerable degree of uniformity by the influence of national employee organizations which have attempted to negotiate wages, hours, and working conditions on a nation-wide basis. Even though their attempts in this direction have not always been successful, they have nevertheless introduced into the employment situation a degree of uniformity which would not otherwise have been obtainable.

Moreover, the requirements for employment are similar so that ages upon entry into rail service have not varied unduly from carrier to carrier, and with the uniformity in employment conditions, it is not unreasonable to suppose that periods of service are not fundamentally different, apart from arbitrary definitions of service relating to its continuity.

If an attempt were made to prorate as between roads the individual costs for parts of services of each employee administrative costs would be materially increased, much additional information would be required, unless some arbitrary method of allocation were adopted, in which event and in the end the results might be no more consistent than under the present Railroad Retirement Act.

The fact that there is at the present time some variation in the numbers of persons who are over retirement age in the service of the carriers is no criterion of ultimate cost, and the cost differentials which are involved are relatively negligible as compared with the total burden. Disregarding the employees over age 70, the difference in the age distribution of employees and in their prior service between the different carriers is probably of no material consequence. Evidence tending to show this is set forth in Exhibit I attached hereto.

MURRAY W. LATIMER.

Subscribed and sworn to before me this 5th of October 1934.

[SEAL] WILLIAM B. RICHARDSON,
Notary Public.

My commission expires Jan. 14, 1939.

EXHIBIT I

In connection with the comparative age and service distributions of employees of railroads, I caused to be made a mathematical analysis of that relationship as of January 1, 1934, on the following seven railroads:

Atchison, Topeka and Santa Fe Railway Company
Atlantic Coast Line Railroad Company
Boston and Maine Railroad
Central Railroad Company of New Jersey
Chicago, Burlington and Quincy Railroad Company
Southern Pacific Company (divisions around Oakland)
Texas and New Orleans Railroad Company

These railroads were selected from the sample of fourteen which were covered in the investigation referred to in the affidavit to which this exhibit is annexed, purely on account of the availability of the cards on which the data was punched, the cards for the other seven roads being tied up on other studies. There is, therefore, no element of conscious selection in the fact that these particular roads were chosen for this investigation. The seven roads included in the study of the relation of age and length of service were distributed substantially over the whole country, geographically, and with as wide differences as regards their pension systems and employment regulations as are to be found in the country. This investigation showed that the "most probable" age of entry into the service of the several carriers were as follows:

A., T. & S. F.	30.9
A. C. L.	28.4
B. & M.	34.2
C. N. J.	31.2
C., B. & Q.	29.3
S. P.	32.4
T. & N. O.	28.7

The "most probable" age upon completion of thirty years' service was as follows:

A., T. & S. F.	55.4
A. C. L.	52.5
B. & M.	54.9
C. N. J.	53.0
C., B. & Q.	52.6
S. P.	55.9
T. & N. O.	54.8

An analysis was made also of the ages at which the greatest number of employees entered the service and completed thirty years. (This, in statistical language, is the modal age of entrance.) These were as follows:

A., T. & S. F.	21.5
A. C. L.	21.0
B. & M.	21.0
C. N. J.	21.0
C., B. & Q.	20.0
S. P.	22.0
T. & N. O.	22.0

The modal ages for completion of thirty years' service were:

A., T. & S. F.	51.5
A. C. L.	51.0
B. & M.	51.0
C. N. J.	51.0
C., B. & Q.	50.0
S. P.	52.0
T. & N. O.	52.0

These data seem to me to indicate that in the long run there will be no appreciable difference in cost as between these carriers, and I know of no reason to suppose that the employment policies of other carriers will not be reasonably consistent with the policies of the seven roads for which detailed data have been available to us.

Two charts, showing graphically the relationships between age and service for the seven railroads, follow.

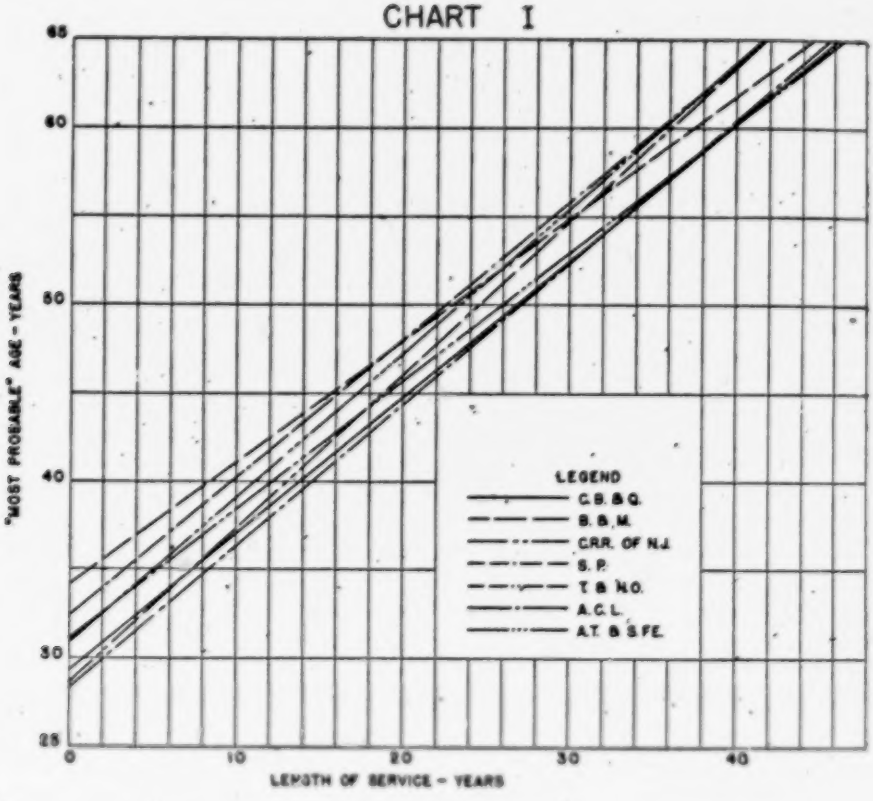
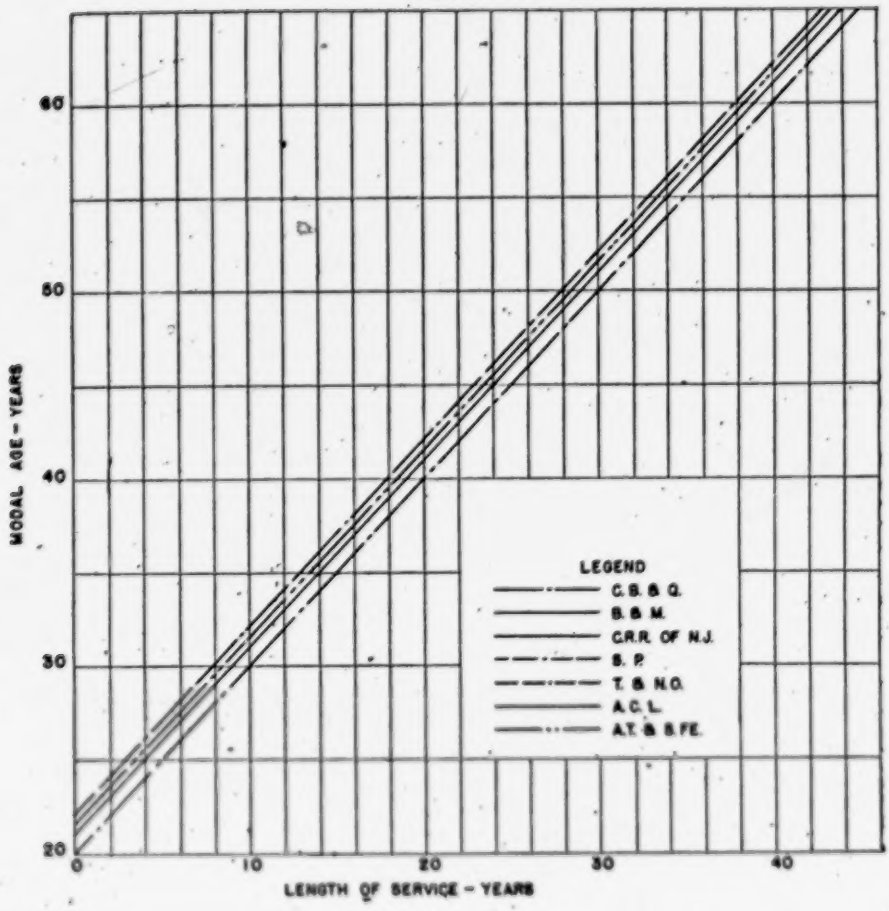


CHART I
"MOST PROBABLE" AGE - YEARS
65
60
50
40
30
25
0
10
20
30
40
LENGTH OF SERVICE - YEARS
LEGEND
C.B. & Q.
B. & M.
C.R.R. OF N.J.
S. P.
T. & N.O.
A.C.L.
A.T. & S.FE.

CHART II


60
50
40
30
20
MODAL AGE - YEARS
0
10
20
30
40
LENGTH OF SERVICE - YEARS
LEGEND
C.B. & Q.
B. & M.
C.R.R. OF N.J.
S. P.
T. & N.O.
A.C.L.
A.T. & S.FE.

Defendants' Exhibit 3

AFFIDAVIT

Filed October 10, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

JAMES C. CLARK, being first duly sworn, deposes and says:

I am at present employed as a consultant by the Federal Coordinator of Transportation, and have been working in this capacity since December 16, 1933.

From June 1, 1929, to December 15, 1933, I was employed by the Equitable Life Assurance Society of the United States as a pension expert in the Group Annuity Division. This work involved an extensive study of both railroad and industry pension plans and the working out and setting up of new pension plans.

From August 15, 1927, to June 1, 1929, I was employed by the Southern Pacific System, as Assistant to the Vice Chairman of the Executive Committee engaged in making a special study of the Southern Pacific System pension and group insurance plans. During the course of this work I came in contact with nearly all the executives, and made an intensive study of the operation of the pension plan over a period of twenty-six years.

From June 1, 1925, to August 14, 1927, I was employed by Industrial Relations Counselors, of New York City, as a railroad and pension expert. This organization is supported largely by John D. Rockefeller, Jr., and, as the name of the organization implies, is concerned almost exclusively with the relationship between employer and employee. During the course of this employment, I made studies of the pension systems of the Pennsylvania Railroad, the Delaware and Hudson Railroad, and several others.

My experience with railroad pension matters started about 1910 while I was working as a conductor on the Oregon Short Line Railroad Company. From 1916 to 1921 I was Assistant to the General Manager of that road. I had charge of the employment service and personnel records, safety bureau, and numerous other activities that were assigned from time to time by the General Manager.

Many conflicting statements have been made as to the purpose of railroad pension plans. The statements vary with the point of view of the person making the statement. From the business point of view, the purpose of pension plans has been to promote a high degree of safety and efficiency in the personnel of the organization. Business managers have found that old employees who are no longer able to function efficiently affect adversely the efficiency of the organization as a whole. In order to retire such employees without injury to employee morale and the friendly attitude on the part of the public, it has been found necessary to grant pensions to the retired employees.

In the absence of a pension plan there is a strong tendency to retain employees in active service long after they have passed the point of maximum or even reasonable efficiency. I am confident that this

statement cannot be contradicted. By way of illustration, in the course of my investigations I was recently brought into contact with the mail and baggage handlers on a large terminal railroad in the Middle West. I can name the company if called upon to do so. Employed in this group are twenty-one men who are sixty-five years of age or older. One of these employees was born February 21, 1853, and is therefore nearly eighty-two years old at the present time; another was born December 18, 1857, being now nearly seventy-seven years old; another was born September 22, 1859, being now just past seventy-five years of age; another was born September 21, 1859, also being just past seventy-five years; six others are now seventy to seventy-four years old, inclusive; and eleven others are now sixty-five to sixty-nine years old, inclusive.

The handling of mail and baggage involves heavy physical labor and obviously requires comparatively young and vigorous men to secure the highest efficiency. The officers of the company, perhaps more than anyone else, realize that these twenty-one men cannot render satisfactory service, but they are all men who have grown old in the service and have rendered excellent service in the past. Since the company has no pension plan, these men have been and are retained in active service.

In my opinion, if and when these twenty-one men are retired, it will be necessary to employ no more than ten young and vigorous men to do the work that the twenty-one are now doing. In the course of my investigations for the Coordinator and my railroad experience, I have encountered instance upon instance of situations similar to that just described.

It is entirely erroneous to assume that the sums paid by the carriers under the Railroad Retirement Act will be entirely out-of-pocket expense; on the contrary, they will be offset to a large extent, and on occasion perhaps entirely, by reductions in the pay roll brought about as indicated in the illustration just stated. This saving in pay roll is in addition to the intangible benefits that accrue to the railroads from a retirement plan.

The fact that with few exceptions the Class I carriers of the United States have established their own pension plans is, to my mind, the best proof that the policy under which these pension plans were established is a sound policy from a strictly business standpoint. The changes with respect to retirement policy that will be brought about under the Railroad Retirement Act will not lessen the benefits to be derived by the carriers, but will, in fact, increase such benefits by enabling them to retire employees in many cases at a younger age than under the present plans and at the same time retain in active service to age seventy such employees as are still capable of rendering efficient service.

(Signed) JAMES C. CLARK.

Subscribed and sworn to before me this 29th day of September 1934.

[SEAL] WILLIAM B. RICHARDSON,
Notary Public.

My commission expires January 14, 1939.

Defendants' Exhibit 4

AFFIDAVIT

Filed October 10, 1934

LEE M. EDDY, being duly sworn deposes and says:

I have been in railroad service since 1904 in the capacity of telegrapher and station agent. Since 1913 I have devoted my time as employee representative for The Order of Railroad Telegraphers in the capacity of General Chairman for six years on the Grand Trunk Railway System covering the lines from Chicago to Portland, Maine, including also the Canadian Lines. Since 1919 I have been an officer for The Order of Railroad Telegraphers in the capacity of Vice President up to the date of appointment as a member of the Railroad Retirement Board.

During this period I have been associated with railroad employee problems in all parts of the United States. For five years my headquarters were in San Francisco, and for three years following in New York City. Since 1927 to the date of appointment as a member of the Railroad Retirement Board my headquarters were at the headquarters of the Organization in St. Louis. On July 26, 1934, while still holding the office of Vice President of the *Order of Railroad Telegraphers*, I was appointed by President Roosevelt as a member of the Railroad Retirement Board.

I have made inquiries from various employee representatives as to the status of employee representatives under the voluntary pension systems in force on American railroads. As a result of my inquiries and my previous knowledge, I have found and state that absence from active service because of engagement in employee organization work is not regarded by many roads as constituting a break in the continuity of service such as to make an employee ineligible to a pension. Employees who are so absent have been considered eligible to pensions if the other requirements provided in the pension systems were satisfied. I have also ascertained and know from personal observation that some railroads authorize the inclusion in an employee's service period, for pension purposes, time spent by him in employee organization service. I have not examined or investigated all of the voluntary pension systems, but I know that such has been the practice in the administration of a number of them, including, by way of illustration, the Missouri Pacific Railroad, Union Pacific Railway, St. Louis San Francisco Railroad, Chicago Rock Island & Pacific, Canadian National, Canadian Pacific, Chesapeake & Ohio, New York, New Haven & Hartford.

II

From my personal experience and from inquiries that I have made I know and, accordingly state, that officers and agents of railroad employee organizations, who are on leave of absence from their railroads in order to engage in their employee organization service, receive free transportation on the railroads, for themselves and their families, in the same manner as employees who are in active railroad service.

III

I have examined the affidavit, filed in this cause, by Julius H. Parmelee, executed the 17th day of September 1934. I have examined particularly the list of employments given on pages 4 and 5 of said affidavit and the classification made in the sheets of Appendix A, of said affidavit, entitled "Memoranda of Formulae to be followed in Preparation of Answers to Questionnaire for Use in Pension Litigation as to Classes of Employees Not Engaged in Interstate Commerce."

I am familiar with the admission and membership rules of the twenty-one Standard Labor Organizations.

I know, and therefore state, that in their admission to membership the said railroad labor organizations do not discriminate between railroad employees on the basis set forth in the said affidavit. Employees performing the work there listed, except officials and their confidential clerks, are eligible to membership in the railroad labor organizations, if their occupations fall within those comprised by said organizations. By way of illustration and without being exhaustive, I mention the following:

Employees engaged in the type of work referred to in items 10, 11, and 12 of the classification in the Parmelee affidavit are eligible to membership in Brotherhood of Maintenance of Way Employees; International Association of Machinists; International Association of Boiler Makers, Iron Ship Builders, and Helpers of America; International Brotherhood of Blacksmiths, Drop Forgers, and Helpers; Sheet Metal Workers International Association; and Brotherhood of Railway Carmen of America. And I know from personal experience and observation that large numbers of the employees engaged in said occupation are members of said organizations.

Employees engaged in the work referred to in item 15 (pumping-equipment operators, stationary engineers and firemen, oilers, coal passers, and water tenders) are eligible to membership in Brotherhood of Maintenance of Way Employees, International Brotherhood of Firemen and Oilers. And I know from personal experience and observation that large numbers of such employees are members of said organizations.

Employees engaged in the occupation referred to in item 7 (Accounting) and the clerks included in the remaining items of the classification, except confidential clerks as above stated, are eligible to membership in Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. And I know from personal experience and observation that large numbers of such employees are members of said organizations.

IV

Employees in these respective crafts have served their apprenticeships and become skilled in the various operations and duties required by members of their craft in railroad service. These duties are not strictly designated as to being interstate or intrastate occupations. They are so overlapping and interwoven as not to be distinguishable, but all relate to maintaining the nation's transportation system.

For the purpose of illustration, a railroad machinist may be working in the back shop today, in the engine house tomorrow, and attending to a running repair on an interstate locomotive the day after. During a life service of thirty years or more, a member of the craft will be engaged in practically every occupation requiring the application of machinists' skill to railroad operation and it is impossible to separate his applied time as between interstate and intrastate occupations. In the back shop he may be working on a locomotive in order that it may be placed in interstate commerce as soon as the repairs are completed. Even though that locomotive is temporarily withdrawn from interstate service, the work of this machinist is so closely connected therewith as to be subject to the regulatory powers of Congress.

The same condition exists in the daily occupations of each and every member of these crafts. The labor of maintenance-of-way employees, the machinists, the boilermakers, the blacksmiths, the sheet-metal workers, and the carmen are essential to the construction and maintenance of all the ways and equipment of the railroad used in interstate commerce.

It is inconceivable that any carrier could operate in interstate commerce without the services listed in items 1 to 16, inclusive, on pages 4 and 5 of the affidavit of Julius H. Parmelee hereinabove referred to.

V

I have reviewed the statement made by Mr. Julius H. Parmelee in the affidavit filed by him in which it is stated that the average age of all employees of all Class I railroads is 42.99 years. From my observations made during a period when the number of railroad employees in the service was much larger than it is today, I am unable to agree with the assumption that the average age of all employees is 42.99 years. While I have no way of making a scientific study of the question, my long years of experience in the operation of seniority rules leads me to believe and to state, that in the reduction of the number of railroad employees for economic reasons the younger employee is separated from the service while the older employee is retained. It is my opinion, based on these observations and conclusions, that the average age of the present personnel of the railroad industry is between 45 and 50 years.

Interstate Commerce Commission records of the total number of all employees, Class I railroads in the United States for the month of July 1934 shows 1,048,817 reported as being in the service of 151 Class I railroads.

This discloses the fact that the July 1934 employment total was 167,080 less than the total employment studied by Mr. Parmelee. It should be noted that there are 22 more railroads included in the Interstate Commerce Commission record referred to than is included in Mr. Parmelee's 1932 study.

It is my opinion that this reduction in the number of employees was made, in most instances, from employees in the lower age brackets, and that the effect would be to raise the average age of the total of remaining employees.

I am also familiar with the statement of Edgar J. McCluse in the affidavit filed by him and signed September 12, 1934, to the effect that representatives of employee organizations have a much higher average age than those actively employed and that the employee representatives' average is 51 years.

I note Mr. McCluse reaches this conclusion from a study of some 640 employee representatives. There are many more than 640 employee representatives in the railroad industry, in fact there are more than 10,000 part-time and full-time employee representatives, and it is my judgment that there is very little difference between the average age of these employee representatives as a whole and the average age of all employees in the railroad industry.

I make this affidavit for use in the above-entitled cause.

LEE M. EDDY.

Subscribed and sworn to before me this 5th day of October 1934.

[SEAL] WILLIAM B. RICHARDSON,
Notary Public.

My commission expires Jan. 14, 1939.

Defendants' Exhibit 5

AFFIDAVIT

Filed October 10, 1934

LEE M. EDDY, being duly sworn, deposes and says:

He is the same Lee M. Eddy who has already made an affidavit for use in the above-entitled cause and that he has the same experiences and qualifications therein recited. He makes this affidavit with knowledge that it is to be used in said cause.

Railroad labor has concerned itself over the matter of pensions during a period of many years, commencing at least as early as 1921. The period between 1921 and the passage of the Retirement Act was marked by increasing dissatisfaction of the employees with the voluntary pension plans of the carriers, this dissatisfaction becoming particularly accentuated during the recent depression years.

The basis of railroad labor dissatisfaction with the voluntary pension systems of the carriers may be summarized as follows:

1. That there is no assurance pensions would be granted; and if granted, that they would be continued.

2. That labor was permitted no voice in the establishment or promulgation of such pension systems.

3. That age retirement generally is not permitted until attaining the age of 70 years.

4. That continuous service of 20 or 25 years is required to entitle an employee to a pension.

An employee may have forty or more years of service with the same carrier but because of a temporary break in such service be disqualified for a pension.

5. Inadequacy of pensions to lower-paid employees when pensions are granted.

Because of the inadequacy of voluntary pension systems on some railroads and the absence of any protection for old age on other

railroads, employee organizations attempted to set up pension systems within the separate craft organizations and to maintain them by voluntary contribution of the members. Notably among these craft organizations seeking to provide this protection are the Brotherhood of Locomotive Engineers, Order of Railroad Conductors, and the International Association of Machinists. These systems were found to be impossible of maintenance due to inability to provide sufficient funds through voluntary contributions.

The convention of The Order of Railroad Telegraphers, held in the City of St. Louis, Mo., in the month of May 1919, created a committee which was instructed to employ actuaries and prepare a plan for the establishment of a contributory pension system, such plan to be considered at its 1921 convention. In 1921 a tentative plan was adopted for submission to and consideration by the individual members. That plan did not meet with the approval of the membership.

At succeeding conventions the organization devoted much time to the consideration of the question of providing a means whereby railroad employees could participate in a system that would assure adequate old-age retirement benefits. To this end the cooperation of other Railroad Employees was proposed, it being recognized that the problem was of mutual concern to all.

The 1930 convention of the Order of Railroad Telegraphers, held in the City of Los Angeles, California, authorized and directed the officers of the Organization to join with the other Railroad Labor Organizations in the preparation of suitable legislation for the enactment into law of a system of Federal retirement annuities for railroad employees to protect all service rendered the industry.

The other twenty standard railroad labor organizations having taken similar action, the Railway Labor Executives Association named and authorized a committee to proceed with actuarial and legal assistance to carry out the instructions of their conventions.

In the meantime, however, the dissatisfaction with persion conditions on the railroad was so pronounced among railroad employees, that a large number of them combined together to organize an association with the special object of securing Federal legislation which would assure old-age protection to railroad workers.

This association was formed in 1930 and was known as the Railway Employees National Pension Association.

During the conferences between the railroads and the Railway Labor Executives Association in January 1932, which resulted in what is known as the National Wage Agreement and which agreement effective February 1, 1932, permitted a deduction of 10% from the wages of each railroad employee, at the request of Labor Representatives the railroads agreed to name a committee to confer with Labor's Pension Committee for the purpose of considering some adequate system of employee retirement pensions. Such a committee was named and several conferences were held, but the committees were unable to reach agreement.

Following the completion of the National Wage Agreement effective on February 1, 1932, the majority of the railroads reduced pension payments by 10% or more. If proof was necessary to convince

CHARACTER OF PENSION PLANS

Class I Steam Roads in the United States, The Pullman Company, and the Railway Express Agency, Inc.

Company	Date plan inaugurated	Funds provided	Are current pension payments made from current earnings	Is pension liability funded or unfunded	Character of pensions provided for: a/o age	a/o disability	a/o service	Is retirement at specified age compulsory	Years of service required to become eligible for pensions: a/o age	a/o disability	a/o service	Notes
FORMAL PLANS:												
Atchison, Topeka & Santa Fe Sys.	Jan. 1,1907	100% Ry.	Yes	Not funded	Yes	Yes	-	No	35 - age 65	15	-	Highest average
Atlantic Coast Line R.R.	Feb. 1904	100% Ry.	Yes	*	Yes	Yes	No	Yes - age 70	10 - age 70	10 over, 20 under age 61	-	Total compensati
Baltimore & Ohio R.R.	Oct. 1,1884	100% Ry.	Yes	Not funded	Yes	Yes	-	No	35 - age 65	10 - age 65	-	Payrolls for 10
Bessemer & Lake Erie RR. A	Jan. 1,1911	100% Ry.	*	*	Yes	Yes	Yes	Yes - men 70 Yes- women 60	25	25	25 - men age 65 25 - women age 55	Average monthly
Buffalo,Rochester & Pittsburgh Ry.	July 1,1901	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 70	20 - ages 65 to 70	20 - ages 60 to 65 A	-	Actual earnings
Canadian National Lines in New England	Jan. 1,1908	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 65a	15	30	-	Highest consecu
Canadian Pacific Ry. (Lines in Me.)	Jan. 1,1903	100% Ry.	Yes	Major part-some funds invested	Yes	Yes	-	Yes - age 65a	25 A	Based on merit	-	Wages for 10 ye
Canadian Pacific Ry. (Lines in Vt.)	Jan. 1,1903	100% Ry.	Yes	Major part-some funds invested	Yes	Yes	-	Yes - age 65a	25 A	Based on merit	-	Wages for 10 ye
Central of Georgia Ry.	July 1,1917	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	25	25 A	-	Actual earnings
Chicago & North Western Ry.	Jan. 1,1901	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20 A	20 A	-	Actual earnings
Chicago,Burlington & Quincy R.R.	Jan. 1,1922	100% Ry.	Yes	*	Yes	Yes	No	Yes - age 70	20 - ages 65 to 70	25	-	Earnings last 1
Chgo.,Rock Island & Pac.(Inc.CRI&P)	Jan. 1,1910	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20J	25	-	Earnings last 1
Chgo.,St.Paul,Minn.& Omaha Ry.	Apr. 1,1906	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20	20	-	Total earnings
Colorado & Southern Ry.	Apr. 1,1922	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20 - ages 65 to 70	25	-	Earnings last 1
Delaware & Hudson R.R.Corp.	Dec. 1,1903	100% Ry.	Yes	Not funded	Yes	Yes	*	No	at age 70	25 - age 65 A	*	Average monthly
Delaware,Lackawanna & Western R.R.	June 1,1903	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	25	25	-	Actual earnings
Denver & Rio Grande Western R.R.	July 1,1917	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20	25	-	Average monthly
Duluth,Missabe & Northern Ry. A	Jan. 1,1911	100% Ry.	Yes J	A	Yes	Yes	Yes	Yes - age 70	25	25	25 - at age 65 optional	Actual earnings
Duluth,Winnipeg & Pacific Ry.	Jan. 1,1908	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 65a	15	20	-	Highest 10 cons
Elgin,Joliet & Eastern Ry. A	Jan. 1,1911	100% Ry.	*	*	Yes	Yes	Yes	Yes - men 70 Yes-women 60	25	25	45 - men age 65 45 - women age 55	Average monthly
Florida East Coast Ry.	July 1,1916	100% Ry.	Yes	*	Yes	Yes	No	Yes - age 70	10	10	-	Average regular
Fort Worth & Denver City Ry.	Apr. 1,1921	100% Ry.	Yes	*	Yes	Yes	No	Yes - age 70	20	25	-	Earnings last 1
Grand Trunk Western R.R.	Jan. 1,1908	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 65a	15	20	-	Highest consecu
Great Northern Ry.	Sept.16,1916	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20 A	25 A	-	Average pay las
Gulf Coast Lines	Nov. 1,1926	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 70	25	25	-	Average monthly
Illinois Central System	July 1,1901	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	25 - at age 70	25	-	Total earnings
International-Great Northern RR	Nov. 1,1924	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 70	25	25	-	Average monthly
Lake Superior & Ishpeming R.R.	Jan. 1,1920	100% Ry.	Yes	Not funded	Yes	Yes	Yes	Yes - age 70	25 - at age 70	25 - ages 60 to 69	25 - age 65	Average earning
Minneapolis,St.Paul & S.S.Marie Ry.	July 1,1910	100% Ry.	Yes	*	Yes	Yes	No	Yes - age 70	15 - at age 65	15	-	Total earnings
Missouri-Illinois RR	Jan. 1,1914	100% Ry.	*	1	Yes	Yes	-	Yes - age 70	25	25	-	Average monthly
Missouri Pacific R.R.	July 1,1917	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 70	25	25	-	Average monthly
Nashville,Chattanooga & St.Louis Ry.	May 1,1914	100% Ry.	Yes	Not funded	No	Yes§	No	No	- -	10 over, 20 under age 61	-	Average monthly
New York Central Lines	Jan. 1,1910	100% Ry.	Yes B	Not funded	Yes	Yes	Yes	Yes - age 70	15	20	40 - age 65 under 70	Total compensati
N.Y.C.& St.L. (Pickel Plate Dist.)	Jan. 1,1914	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	10 - at age 70 A	20 A	-	Average monthly
Norfolk & Western Ry.	July 1,1917	100% Ry.	Yes	Trust fund established	Yes	Yes	Yes	Yes - age 70	at age 70	20	25 - ages 65 to 69	Total earnings
Northern Pacific Ry.	May 1,1922	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	30	20 - ages 61 to 65 25 - otherwise	-	Total earnings
Northwestern Pacific R.R.	Sept. 1,1912	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20	20 - incapacity - ages 61-70§	-	Average monthly
Pennsylvania R.R.System	Jan. 1,1900	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 70	at age 70	30 - ages 65 to 69	-	Total pay last
Pullman Company	Jan. 1,1914	100% Co.	Yes	Not funded	Yes	Yes	No	Yes- women 65 Yes - men 70	30	30	-	Average monthly
Railway Express Agency, Inc.	Nov. 1,1929g	100% Co.	Yes	Not funded	Yes	Yes	Yes	Yes - age 70	30	20 - at age 65 or over	40 - at age 65 or over	Average monthly
Reading System	Dec. 17,1902	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	25 - at age 70 35 - at age 65	30	-	Average earning
Richmond,Fredericksburg & Potomac R.R.	June 1,1924	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	at age 70	25	-	Total earnings
St.Joseph & Grand Island Ry.	Jan. 1,1921	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20	20 - women - 25 - men 20 - incapacity - ages 61-70	-	Average monthly
St.Louis-San Francisco Lines	July 1,1913	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	15	20	-	Average monthly
Southern Pacific Lines	Jan. 1,1901	100% Ry.	Yes	Not funded	Yes	Yes	-	Yes - age 70	20 - ages 65 to 70	20 - women - 25 - men 20 - incapacity - ages 61-70	-	Average monthly
Spokane,Portland & Seattle Ry.	Sept. 1,1936	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20	20 - at age 65 25 - otherwise	-	Average monthly
Staten Island Rapid Transit Ry.	Oct. 31,1917	100% Ry.	Yes	Not funded	Yes	Yes	-	No	35 - at age 65	10 - at age 65	-	Earnings 10 yea
Texas & Pacific Ry.	Apr. 1,1925	100% Ry.	Yes	Not funded	Yes	Yes	No	No	25 - ages 65 to 70	25	-	Earnings 10 yea
Union Pacific System	Jan. 1,1901g	100% Ry.	Yes	Not funded	Yes	Yes	No	Yes - age 70	20	20 - women - 25 - men 20 - incapacity - ages 61-70	-	Average monthly
Western Maryland Ry.	Jan. 1,1916	100% Ry.	Yes	Not funded	Yes	Yes	No	No	20 - at age 65	Individual consideration	-	Average monthly
Wichita Valley Ry.	Apr. 1,1918	100% Ry.	Yes	*	Yes	Yes	No	Yes - age 70	20 - ages 65 to 70	25	-	Earnings last 1
INFORMAL PLANS:												
Ann Arbor R.R.	Aug. 1914	100% Ry.	Yes	Not funded	No	Yes	No	No	-	25	-	Average monthly
Boston & Maine R.R.	Oct. 1,1901	100% Ry.	Yes	*	No	Yes	No	*	-	30	-	Wages middle ye
Central R.R.Co.of New Jersey	Jan. 1,1903	100% Ry.	Yes	Not funded	Yes	Yes	No	No	30	30 (except in case accident)	-	Actual earnings
Central Vermont Ry. Inc.	Jan. 1,1925	100% Ry.	Yes	Not funded	Yes	Yes	-	No	15	15	-	Average earning
Chesapeake & Ohio Ry.	*	100% Ry.	Yes	Not funded	Yes	Yes	No	No	20	25	-	Total earnings
Chicago & Eastern Illinois Ry.	*	100% Ry.	Yes	Not funded	No	No	Yes	No	-	-	No specified years	Generally a num
Detroit & Mackinac Ry.	Mar. 1910	100% Ry.	Yes	Not funded	Yes	Yes	-	No	30	30	-	Average compens
Detroit & Toledo Shore R.R.	July 1,1922	100% Ry.	Yes	Not funded	Yes	Yes	No	No	No fixed rule	No fixed rule	-	Average for 10
Erie R.R. System	June 24,1927	100% Ry.	Yes	Not funded	Yes A	Yes	*	Yes - age 70§	at age 70 A	20 (over age 65) (a/c injury)	*	Average monthly
Georgia & Florida R.R.	Nov. 21,1914	100% Ry.	Yes	Not funded	Yes	Yes	-	No	*	*	-	Approximately 5
Kansas City Southern Ry. (Inc.1929)	1930	100% Ry.	Yes	Not funded	Yes	Yes	No	No	No definite restriction as to length of service required			Average earning
Lehigh Valley R.R.	* (1907)	100% Ry.	Yes	Not funded	Yes	*	*	No	30 - at age 65	*	*	Not necessarily
Louisville & Nashville R.R.	1901	100% Ry.	Yes	Not funded	No	Yes	No	No	-	15	-	Average monthly
Maine Central R.R.	Feb. 1,1901	100% Ry.	Yes	Not funded	No	Yes	No	No	-	30	-	Average earning
Missouri-Kansas-Texas Lines	Jan. 1918	100% Ry.	Yes	Not funded	No	Yes	No	No	-	20	-	Average monthly
N.Y.C.& St.L.(L&E Dist..Clover Leaf Dist.)	May 1,1927	100% Ry.	Yes	Not funded	No	Yes	No	No	-	20 (when incapacitated)	-	Monthly earning
New York,New Haven & Hartford R.R.	1890	100% Ry.	Yes	Not funded	No	Yes	No	No	-	30	-	Monthly earning
New York,Ontario & Western Ry.	Nov. 1915	100% Ry.	Yes	Not funded	Yes	Yes	-	No	30 (On Merits)	On Merits	-	40% last 10 yea
Pere Marquette Ry.	July 1,1925	100% Ry.	Yes	Not funded	No	Yes	No	No	-	20 (totally disabled)	-	Average earning
St.Louis Southwestern Lines	Jan. 1,1915	100% Ry.	Yes	Not funded	Yes	Yes	Yes	No		No regular requirements		No set method.
Seaboard Air Line Ry.	A	100% Ry.	Yes	Not funded	No	Yes	No	No	-	25	-	company pays 11
Texas Mexican Ry.	Oct. 29,1929	100% Ry.	Yes	Not funded	Yes	Yes	Yes	No	No limitations - each case acted on by the board			Average earning
Wabash Ry.	Dec. 1,1915	100% Ry.	Yes	Not funded	No	Yes	No	No	-	25	-	40% of last ear
INFORMATIVE PLANS:												
Alton R.R.	*	*	*	*	Pay a few gratuities to men who have been in the employ of the Company for many years, who have become incapacitated by reason of							
Atlanta & Post Point (Incl.W.Ry.of Ala.)	About 1913	100% Ry.	Yes	Not funded	The management has since about 1913 voluntarily granted to employees of advanced age with long service records certain gratuity pay							
Bangor & Aroostook R.R.	About 1918	100% Ry.	Yes	*	Deserving employees who have become unfit for service account age or disability are granted pensions as and when authorized by the							
Chicago,Indianapolis & Louisville Ry.	*	*	*	*	Makes a few grants. Each case handled strictly on its merits; neither age, nor length of service are controlling factors.							
Georgia R.R.	1914	100% Ry.	Yes	Not funded	The management has since about 1914 voluntarily granted to employees of advance years with long service records certain gratuity p							
Illinois Terminal R.R.System	*	100% Ry.	Yes	Not funded	Have made allowances in a few cases. Individual circumstances considered in each case separately.							
Lehigh & Hudson River Ry.	*	*	*	*	Board of Directors have authorized Special Compensation to be paid to employees who have been outstanding,faithful,efficient, loyal							
Lehigh & New England R.R.	*	*	*	*	Board of Directors grant gratuities which continue at the pleasure of the Board. Each case is handled on its merits.							
Minneapolis & St.Louis R.R.	*	*	*	*	Grant pensions - each case is given separate and individual consideration. No regular retirement age. When employees of long serv							
Toledo,Peoria & Western R.R.	*	*	*	*	Grants range from $15.00 to $75.00 per month - but as specified amounts established.							
					Make payments each month to a few retired employees.							

* Not reported. A 1% on first $90.00 and 1/4 of 1% on excess of highest average salary. In exceptional cases of long and unbroken service with first class records payment may be increased to the extent of 25%. J Plus 25% in exc
Ry., are covered through the United States Steel and Carnegie Pension Fund. This fund, according to the report of the Duluth,Missabe & Northern Ry. is a fund of $12,000,000, established by United States Steel Corporation on January 1
totally incapacitated, through injuries received in performance of his duty or through sickness, may be awarded such pension as the President shall determine. g Extensions are granted in certain cases at discretion of proper authori
except under special circumstances to be approved by the committee. § On disability applications, 15 years service is considered for meritorious service, such as loyalty during strikes, floods or other extraordinary service. h Lib
be pensioned on account of disability in special cases regardless of age. Employees who have reached age 65 can be pensioned on account of disability regardless of number of years service. i Some pension payments over and above pr
k Applicants inexperienced in railway work over 35 years and experienced applicants over 45 years of age are not eligible for pension. l Effective July 1, 1934 company contracted with Metropolitan Life Insurance Co., for certain em

Class I Steam Roads in the United States, The Pullman Company, and the Railway Express Agency, Inc.

Matter of pensions provided for			Years of service required to become eligible for pensions			Method of arriving at monthly earnings for use in computing pension	Percentage allowed in pension for each year of service	Maximum and/or minimum pension allowances per month	
a/c disability	a/c service	Is retirement at specified age compulsory	a/c age	a/c disability	a/c service			Maximum	Minimum
Yes	-	No b	15 - ages 65	15	-	Highest average monthly pay during any consecutive 10 years of service	1½	$75.00 g	$20.00
Yes	No	Yes - age 70	10 - ages 70	10 over, 20 under age 61	-	Total compensation plus relief department benefits 10 years preceding retirement ÷ 120	1½	None	15.00
Yes	-	No	35 - ages 65	10 - age 65	-	Payrolls for 10 years previous to retirement	1½	None	25.00
Yes	Yes	Yes - men 70 Yes - women 60	25	25	25 - men age 65 25 - women age 55	Average monthly pay during last 10 years of service	1½	None	None
Yes	-	Yes - age 70	20 - ages 65 to 70	20 - ages 60 to 65 d	-	Actual earnings for last 10 years of service	2½	75.00	25.00
Yes	-	Yes - age 65a	15	30	-	Highest consecutive ten years earnings as shown on payroll	1½	None	25.00
Yes	-	Yes - age 65a	25 f	Based on merit	-	Wages for 10 years prior age 65 ÷ 120 (large time locomotives on their merits)	1½	None	25.00
Yes	-	Yes - age 65a	25 f	Based on merit	-	Wages for 10 years prior age 65 ÷ 120 (large time locos treated on their merits)	1½	None	25.00
Yes	No	Yes - age 70	25	25 d	-	Actual earnings 10 years immediately preceding date of retirement	1½	None	25.00
Yes	No	Yes - age 70	20 h	20 h	-	Actual earnings 10 years preceding month of retirement ÷ 120	1½	None	12.00
Yes	No	Yes - age 70	20 - ages 65 to 70	25	-	Earnings last 10 years ÷ 120 (unless absences due disability incident to service)	1½	150.00	25.00
Yes	No	Yes - age 70	25	25	-	Earnings last 10 years ÷ 120	1½	150.00	20.00
Yes	No	Yes - age 70	20	20	-	Total earnings last 10 years, excluding amounts earned at penalty rates ÷ 120	1½	None	12.00
Yes	No	Yes - age 70	20 - ages 65 to 70	25	-	Earnings last 10 years ÷ 120 (unless absence due disability incident to service)	1½	150.00	25.00
Yes	-	No	at age 70	25 - age 65 i	-	Average monthly earnings for last 120 months times number years in service	1½	None	None
Yes	No	Yes - age 70	25	25	-	Actual earnings last 10 years preceding retirement	1½	None	25.00
Yes	No	Yes - age 70	20	25	-	Average monthly pay 10 years preceding retirement	1½	150.00	20.00
Yes	Yes	Yes - age 70	25	25	25 - at age 65 optional	Actual earnings last 10 years service ÷ actual time worked last 10 years	1½	None	None
Yes	-	Yes - age 65a	15	30	-	Highest 10 consecutive years earnings as shown on payroll	1½	None	25.00
Yes	Yes	Yes - men 70 Yes-women 60	25	25	25 - men age 65 25 - women age 55	Average monthly pay during last ten years of service	1½	None	None
Yes	No	Yes - age 70	10	10	-	Average regular monthly pay 10 years immediately preceding retirement	2½	None	None
Yes	No	Yes - age 70	20	25	-	Earnings last 10 years divided 120 (unless absence due disability incident to service)	1½	150.00	25.00
Yes	-	Yes - age 65a	15	30	-	Highest consecutive 10 years earnings as shown on payrolls	1½	None	None
Yes	No	Yes - age 70	30 k	25 k	-	Average pay last 10 years of service	1½	None	25.00
Yes	-	Yes - age 70	25	25	-	Average monthly pay last 10 years	1½	None	20.00
Yes	No	Yes - age 70	25 - at age 70	25	-	Total earnings 120 months preceding retirement ÷ actual number of months worked	1½	None	20.00
Yes	-	Yes - age 70	25	25	-	Average monthly pay last 10 years of service	1½	None	20.00
Yes	Yes	Yes - age 70	25 - at age 70	25 - ages 60 to 69	25 - ages 65	Average earnings for 10 years next preceding retirement	1½	100.00	18.00
Yes	No	Yes - age 70	15 - at age 65	15	-	Total earnings for last 10 years ÷ number of months worked during the period	1½	None	15.00
Yes	-	Yes - age 70	25	25	-	Average monthly pay last 10 years of service	1½	100.00	20.00
Yes	-	Yes - age 70	25	25	-	Average monthly pay last 10 years of Service	1½	None	20.00
Yes	No	No	-	10 over, 20 under age 61	-	Average monthly pay received 10 years preceding retirement	1½	None	20.00
Yes	Yes	Yes - age 70	15	30	40 - age 65 under 70	Total compensation last ten years of service ÷ actual months during period	1½	None	10.00
Yes	No	Yes - age 70	10 - at age 70 k at age 70	20 k	-	Average monthly earnings last 10 years preceding retirement	1½	200.00	5.00
Yes	Yes	Yes - age 70	at age 70	20	25 - ages 65 to 69	Total earnings last ten years ÷ actual months worked during period	1½	None	20.00
Yes	No	Yes - age 70	20	20 - ages 61 to 65 25 - otherwise	-	Total earnings 10 years preceding date of retirement ÷ 120	1½	416.66	25.00
Yes	No	Yes - age 70	20	20 - incapacity - ages 61-70 k	-	Average monthly pay for 10 year period preceding retirement ÷ actual no. of mos. worked	1½	None	None
Yes	-	Yes - age 70 at age 70		30 - ages 65 to 69	-	Total pay last 10 years ÷ number of months actually engaged during that time	1½	None	15.00
Yes	No	Yes- women 65 Yes - men 70	30	20	-	Average monthly wages last 120 months	1½	None	15.00
Yes	Yes	Yes - age 70	20	20 - at age 65 or over	40 - at age 65 or over	Average monthly pay 10 years preceding retirement	1½	None	20.00
Yes	No	Yes - age 70	25 - at age 70 35 - at age 65	30	-	Average earnings last 10 years of service	1½	None	None
Yes	No	Yes - age 70	at age 70	25	-	Total earnings ten years preceding retirement ÷ months worked during period	1½	None	None
Yes	No	Yes - age 70	30	20 - women - 25 - men 20 - incapacity - ages 61-70	-	Average monthly pay 10 years preceding retirement	1½	None	25.00
Yes	No	Yes - age 70	15	20	-	Average monthly earnings 10 years preceding retirement	1½	150.00	20.00
Yes	-	Yes - age 70	20 - ages 65 to 70	20 - women - 25 - men 20 - incapacity - ages 61-70	-	Average monthly pay 10 years preceding retirement	1½	None	None
Yes	No	Yes - age 70	20	30 - at age 65 25 - otherwise	-	Average monthly pay 10 years preceding retirement	1½	None	25.00
Yes	-	No	35 - at age 65	10 - at age 65	-	Earnings 10 years previous to retirement	1½	None	25.00
Yes	No	No	25 - ages 65 to 70	25	-	Earnings 10 years preceding retirement	1½	100.00	25.00
Yes	No	Yes - age 70	20	20 - women - 25 - men 20 - incapacity - ages 61-70	-	Average monthly pay 10 years preceding retirement	1½	None	25.00
Yes	No	No	20 - at age 65	Individual consideration	-	Average monthly earnings 10 years preceding retirement	1½	100.00	*
Yes	No	Yes - age 70	20 - ages 65 to 70	25	-	Earnings last 10 years ÷ 120 (unless absence due disability incident to service)	1½	150.00	25.00
Yes	No	No	- -	25	-	Average monthly earnings last 10 years times years continuous service	1½	75.00	25.00
Yes	No	*	- -	30	-	Wages middle week every third month 10 years prior to retirement or prior age 70	2-7½	45.00	10.00
Yes	No	No	30	30 (except in case accident)	-	Actual earnings last 10 years of service	1½	None	None
Yes	-	No	15	15	-	Average earnings for last 10 years of service	1½	None	None
Yes	No	No	20	25	-	Total earnings 10 years preceding retirement ÷ months worked or subject to call	1½	None	15.00
No	Yes	No	-	-	No specified years	Generally a nominal allowance - governed by circumstances (allowances range $25 to $50)	None	None	None
Yes	-	No	30	30	-	Average compensation 10 years preceding retirement times years service	1½	50% salary	25.00
Yes	No	No	No fixed rule	No fixed rule	-	Average for 10 years of highest rates paid	1½	None	None
Yes	*	Yes - age 70g	at age 70 k	20 (over age 65)	*	Average monthly pay last 10 years	1½	k	None
Yes	-	No	*	(a/c injury)	-	Approximately 50% employees earnings when retired from service	None	None	None
Yes	No	No	No definite restriction as to length of service required			Average earnings 10 years immediately prior date of retirement (exceptions made by co.)	1½	None	None
*	*	No	30 - at age 65	*	*	Not necessarily computed on monthly earnings - each case considered on its merits	None	None	None
Yes	No	No	-	15	-	Average monthly salary last ten years previous to retirement	1½	None	15.00
Yes	No	No	-	20	-	Average earnings last 10 year period - years of service & financial condition considered	None	45.00	10.00
Yes	No	No	-	20	-	Average monthly earnings last 10 years service	1½	100.00	None
Yes	No	No	-	20 (when incapacitated)	-	Monthly earnings, age, years of service and finances of employee considered	None	None	None
Yes	No	No	-	30	-	Monthly earnings based on weeks incl.15th Jan.-April.& Oct. 10 years prior retirement	1½	None	None
Yes	*	No	On Merits	On Merits	-	40% last 10 years average salary	-	None	None
Yes	No	No	-	20 (totally disabled)	-	Average earnings last 10 years; age,service & service record & physical ability considered	1½	None	None
Yes	Yes	No	No regular requirements			No set method. Employees in train or engine service receive pension from organization and company pays like sum. Other employees about 50% of former pay.	None	None	None
Yes	No	No	-	25	-	Average earnings 10 years prior to date of pensions	1½	None	None
Yes	Yes	No	No limitations - each case acted on by the board			40% of last monthly earnings	-	None	None
Yes	No	No	-	25	-	Average monthly earnings last ten years worked times number years in continuous service	1½	75.00	25.00

a Fee gratuities to men who have been in the employ of the Company for many years, who have become incapacitated by reason of old age or other cause or who are in destitute circumstances. Matter of charity, no plan or obligation. Management has since about 1915 voluntarily granted to employees of advanced age with long service records certain gratuity payments.

b Leaving employee who have become unfit for service account age or disability are granted pensions as and when authorized by the Board of Directors; to continue at the pleasure of the Board. Each case considered on its merits.

c Fee grants. Each case handled strictly on its merits; neither age, nor length of service are controlling factors.

d Management has since about 1914 voluntarily granted to employees of advance years with long service records certain gratuity payments.

e Made allowances in a few cases. Individual circumstances considered in each case separately.

f Board of Directors have authorized Special Compensation to be paid to employees who have been outstanding,faithful,efficient, loyal men who have served the company many years who have become disabled through the infirmities of age.

g Board of Directors grant gratuities which continue at the pleasure of the Board. Each case is handled on its merits.

h Pensions - each case is given separate and individual consideration. No regular retirement age. When employees of long service are no longer able to continue in service, consideration is given to health, financial condition, etc.

i Pensions range from $15.00 to $75.00 per month - but no specified amounts established.

j Gratuity payments each month to a few retired employees.

k Service of long and unbroken service with first class records payment may be increased to the extent of 25%. l Plus 25% in exceptional cases. m December 1 Lake Erie R.R., Duluth,Missabe & Northern Ry., and the Elgin,Joliet & Eastern Ry. is a fund of $12,000,000, established by United States Steel Corporation on January 1, 1911, and applied to its subsidiaries. n Any faithful employee irrespective of age or length of service, provided such pension as the President shall determine. o Extensions are granted in certain cases at discretion of proper authorities. p Employees who enter service after attaining the age of forty years are not eligible for pension service is considered for meritorious service, such as loyalty during strikes, floods or other extraordinary service. q Limit of employable age under pension rules is 35 years. r Employees who have completed 25 years service can be pensioned on account of disability regardless of number of years service. s Some pension payments over and above pro-rata share of income from United States Steel and Carnegie Pension Fund are made from current earnings.

t Not eligible for pension. u Effective July 1, 1934 company contracted with Metropolitan Life Insurance Co., for certain annuities. v Payments made on account of pensions granted in 1925, 1926 and 1927 are charged to pension

w Not eligible for pension. x If under 61 years of age 25 years service required for male employees and 30 years for female employees. y Prior to November 1, 1929 this company followed the plan of the American Express Company who in

individual employees of their need for some assurance that they would receive pensions upon retirement, and that pensions already granted would be continued, this action furnished such proof. The activity of the employees with respect to the matter of pensions immediately increased, due to this aggravation of an already unsatisfactory condition.

It was obvious that action of some kind was necessary to correct the condition of which the employees complained, as the lowered morale of railroad workers gave indication of bringing about strained relations in the railroad industry as between the employer and employee.

The railroad employee realized more fully than anyone else his inability to provide for his needs upon his reaching the age of retirement and the period of life when he could no longer efficiently produce. The older workers in the railroad industry found that their experiences had been most disheartening in their efforts to save and invest even small amounts to be available for use in providing for a "rainy day." They became thoroughly convinced that relief could not be had except through legislation. Consequently they exhibited intense interest in the consideration given to the proposed plans which were submitted to Congress and which resulted in the enactment of the Railroad Retirement Act.

Railroad employees have from the start exhibited a willingness to contribute a substantial part of the funds necessary to establish a retirement system. Not only have they been willing to contribute, but they have been desirous of being furnished an opportunity to participate in the construction of a retirement plan and in the provision of the funds necessary with which to meet its obligations.

During the course of testimony given by Mr. Julius H. Parmelee in the hearings conducted by a subcommittee of the Committee on Interstate Commerce April 23 to 26, inclusive, 1934, Mr. Parmelee filed as an Exhibit a tabulated statement showing the character of pension plans, Class I Steam Railroads in the United States, the Pullman Company, and the Railway Express Agency, Inc. This statement is incorporated in the printed copy of the hearings, pages 90 and 91. For convenience and ready reference a printed copy of this tabulated statement is attached hereto.

It will be noted that this tabulation of characteristics of such pension plans confirms statements made by me in this affidavit to the effect that there is no participation by labor in the construction and administration of these plans, that the retirement age is generally age 70, that the basis for calculating pensions is inadequate, and that a service period of 20 to 25 years is generally required.

I make this affidavit for use in the above-entitled cause.

LEE M. EDDY.

Subscribed and sworn to before me this 5th day of October 1934.

[SEAL] WILLIAM B. RICHARDSON,
Notary Public.

My Commission expires Jan. 14, 1939.

Defendants' Exhibit 6

AFFIDAVIT

Filed October 10, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

OTTO S. BEYER, being duly sworn, deposes and says:

After having served the railroad industry since 1908, in various engineering, supervisory, and research capacities, I have devoted most of my time since 1919 to the furthering of constructive relations between railroad management and labor. Because of my work in this field, the Federal Coordinator of Transportation, when he organized his staff of experts, engaged my services as Director of his Section of Labor Relations, which position I am now holding. This section was organized by the Coordinator for the purpose, among other things, of conducting such investigations and considering such means as might be necessary in order to improve the stability of railroad employment and effect other improvements in railroad labor conditions as called for specifically by Section 13 of the Emergency Railroad Transportation Act, 1933.

I

In my capacity of Director of the Section of Labor Relations, I have given careful thought and study to the problem of superannuation of railroad employees in its relation to the larger problem of railroad rehabilitation; and I have come to the conclusion that this problem presents one of the major difficulties confronting the industry, that the longer its solution is postponed the more aggravated the problem will become and the greater the ultimate cost of solution. Comprehensive, reliable information emanating from railroad employees and their labor organizations all over the country, which has come to my attention, further emphasizes that the difficulty of retiring superannuated railroad employees has, from the viewpoint of railroad labor, steadily increased until it now assumes as large a place in labor's program for safeguarding the welfare of railroad employees as, for example, the maintenance and increase of rates of pay, or the orderly and prompt adjustment of labor disputes.

In order to expedite solution of this problem I have launched with the approval of the Federal Coordinator of Transportation, a comprehensive survey of the employment histories of a large representative sample of railroad employees. The survey has been conducted as a federal project, with funds provided by the Civil Works Administration and the Federal Emergency Relief Administration.

The results of this survey definitely confirm the common belief as to the extent to which superannuation prevails among railroad employees when compared with the employees of other industries or with the employees of industry in general and clearly indicates that the separation from the railroads of long service employees has not only been insufficient to permit younger men and women to enter the industry, but has also been inadequate to permit younger em-

ployees, who came into the industry in recent years, to retain their employment. The result is, therefore, that the railroad industry is now severely handicapped through the inadequacy of the influx of young employees to provide necessary candidates for the many positions of the railroad industry which demand responsibility, alertness, resourcefulness, imagination, and cooperative ability.

There are also many positions in the railroad industry such as yard locomotive engineers, yard conductors and switchmen, hostlers and hostler helpers, freight train conductors, flagmen, brakemen, engine house mechanics, bridge and building carpenters, and section foremen, where physical agility, mental alertness, good eyesight and hearing, and ability to work with others, are of prime importance to the safe, efficient, and reliable performance of the work to be done. Modern large freight classification yards where operations have been expedited by all kinds of mechanical devices, large, heavy, and complicated locomotives, steam and electrical, freight trains often more than a mile in length, and passenger trains operating at high speed, have all within recent years greatly increased the demands of the industry on the physical and mental faculties of its employees, and on their ability to work in prompt and exact coordination with their fellows. It is a well known fact that in advanced years, the capacity of an employee to respond to the more intense demands of industry generally declines. Eyesight and hearing deteriorate and the ability to move quickly and respond promptly to signals becomes impaired. The result of necessity is that as the average age of these employees in the railroad industry persistently advances, as has been the case during the last decade, a factor is introduced which quite definitely tends to reduce the general efficiency of the industry.

Furthermore, in an industry such as railroading where promotion of younger employees is definitely and obviously retarded because of inability to retire old employees, the morale of labor is weakened so that efficiency and economy of operation and the standard of service are adversely affected. In short, if an employee sees little ahead to strive for in the way of promotion, he is deprived of a very substantial incentive necessary to encourage him in maintaining or raising the standard of his work. It is, therefore, essential for the general good of the railroad industry to restore this incentive, insofar as possible.

In view of these facts it is my definite conclusion that the systematic retirement of superannuated employees, substantially in keeping with the plan now provided by the Railroad Retirement Act, is indispensable to the safe and efficient conduct of the industry, and is, therefore, in the public interest.

II

While such voluntary pension schemes as have been established by many railroads are helpful, they are not commensurate with the superannuation problem of the industry. These voluntary pension schemes were originally established while the traffic of the railroads was expanding and employment increasing. The main purpose served was to enable loyal employees who had been relatively long

in the service of a single company, and whose employment record had not been interrupted by resignations, discharges, or strikes, to retire with a limited benefit.

Since such was the purpose, it frequently happened that employees who had devoted their lives to the railroad industry, but had not necessarily always done so on one particular property, were denied such benefits as these plans provided.

A check of the employees retired by all the Class I railroads under their rules at age 70, made under my direction as Director of the Section of Labor Relations, revealed that of the 28,667 employees so retired for the five-year period, 1929 to 1933, 4,874 or 17% were retired without pension benefits.

There is evidence which indicates that one of the original motives of many railroad companies in establishing pension systems was to discourage employees from participating in concerted labor activities to promote their welfare by means of wage increases and the like. Because of this fact, and since the rules of many company pension schemes operated to discourage employees from becoming involved in conventional labor union activities, these company schemes quite generally came to be viewed by many employees with suspicion and often hostility. Subsequent experience by employees who resorted to the strike to secure redress for their grievances, confirmed this suspicion and their hostility, for some of them were subsequently denied such pensions as they would have received had thy not struck. There are cases on record of railroad companies at the time of a strike, serving notice on employees already pensioned, demanding that they report for duty to fill jobs vacated by the strikers on pain of losing their pensions. In extenuation, however, it should be pointed out that in recent years certain companies have pursued a more liberal attitude and even though employees may have withdrawn temporarily from the service, they were not penalized by having their prior service credits cancelled when they returned to duty.

Another feature of voluntary pension plans which has made them unsatisfactory to the employees is the fact that even though there may have been no inclination on the part of the companies to wean their employees away from labor union activities, there was no assurance that pension benefits, when once granted, would actually be paid until death, or if paid at a certain rate, would not subsequently be reduced. Here again the actual experience of large numbers of pensioners, more particularly during the last three years, has seriously shaken the confidence of railroad employees in voluntary company schemes. Practically all railroads have reduced their pension allowances 10 percent in general keeping with the so-called Chicago 10 percent Wage Deduction Agreement of 1932, but several other railroads, such as the Boston and Maine, New York Central, and the Chicago and Northwestern have gone a great deal further and decreased their pensions from 15% to 40%.

Furthermore, existing voluntary pension systems have been so applied, especially since 1930, as to retire relatively fewer and fewer employees. In the face of an aggravated unemployment situation, this served only to intensify the dissatisfaction of railroad employees as a whole with voluntary schemes. The younger railroad employee,

either unemployed or working part time, sees older men retained in service who ordinarily would be retired, while the older employee who has reached retirement age and looked forward to the day when he would be retired, finds that he must continue in service and may, perhaps, never be pensioned at all.

In an industry such as railroading, manned by employees with a high sense of responsibility and accustomed by practice, safeguarded by federal law, to join with management in the establishment of the many complicated labor standards governing the industry, it is an anomaly to find that the system for retiring superannuated employees is a paternalistic company device and not a joint undertaking. It is and always has been a purely paternalistic measure and as such has never been liked by the employees, although in recent years on some railroads it has been tolerated. To separate the retirement of railroad employees from the relationship of paternalism and to administer this function, with the employees participating in the financing of the plan and having a dignified voice in its administration, as the Railroad Retirement Act proposes, would not only result in very substantial good for the railroad industry, but would do away with all the unsatisfactory features of paternalistic company plans. In short, the Railroad Retirement Act, jointly administered and financed by the railroads and their employees, would be a vast improvement upon the mosaic of paternalistic retirement schemes heretofore superimposed upon the industry.

III

Among other things, the Railroad Retirement Act provides that an employee who has been in the service of a carrier within one year prior to the enactment of the Act, i. e., June 27, 1934, shall be entitled to the benefits of the Act. This retroactive provision was incorporated by the framers of the bill, largely at my suggestion, as an alternative to several other provisions less definite and less satisfactory.

The reason for such a provision grew out of the wide-spread use of the so-called seniority and extra board system in railroad employment. This system, generally speaking, grants to railroad employees who have been furloughed because of reduction in expenses, so-called prior reemployment rights. That is, the last employee removed from the pay roll is the first to be recalled to service when a vacancy occurs. This practice is of long standing in the railroad industry and in many cases is covered by written agreements. Furthermore, in order to fill unexpected vacancies, railroads are necessarily dependent upon a substantial number of employees at each place of employment. Such employees are usually referred to as "extra" or "stand-by" employees. The establishment of the seniority principle and the maintenance of lists of extra or stand-by employees has been brought about by mutual agreement between men and managements and is therefore acceptable to both.

For all practical purposes, these extra employees, although not necessarily on the pay roll, are essential to the proper conduct of the railroad industry. On some railroads employees who have been furloughed are eligible to return to service in the event of vacancies, irrespective of the length of time they may have been away, provided, of

course, that they are physically fit to return. On other railroads a definite time limit is recognized, at the expiration of which furloughed employees are no longer eligible for recall to service. This time limit may range anywhere from a few months to a year. There is no very definite rule except that the retention of reemployment rights for a year subsequent to the date of furlough, where a definite period is involved, seems to have been a common practice. In the circumstances, therefore, rather than leave the question of whether so-called stand-by or extra employees were entitled to the benefit of the Act, to the future determination of the necessarily vague term "reemployment rights", it was considered preferable to confine the benefits to those employees only who were, generally speaking, serving in so-called stand-by capacity, and who had been furloughed a year or less prior to the date of approval of the Retirement Act. This seemed to be the most intelligent and satisfactory compromise that could be made between the necessarily indefinite provisions which would have been interpreted variously as to whether so-called stand-by employees were entitled to the provisions of the Act, and an arbitrary provision necessarily denying any benefits whatsoever to such stand-by employees, who are essential to the proper conduct of the industry.

IV

The Act also provides that all employees who have reached age 65 or over, or who have completed a service period of 30 years, shall be entitled to retirement and annuity benefits irrespective of the amount of their and the carrier's contributions to the retirement fund. Many employees will thus be retired with annuities on behalf of whom neither they nor the employing railroad will have made contributions sufficient to finance these annuities.

When a retirement benefit system is first established, this has been found to be the only practical way to meet the situation created by the fact that there are always a large number of individuals due for annuities prior to the time that sufficient funds have been accumulated for them. The only other alternative would be to retire these individuals with annuities directly proportionate to the credits established for them subsequent to the inauguration of the system and this would obviously result in retiring large numbers immediately with little or nothing in the way of benefits. Thus, one of the major objectives of a sound retirement system would be defeated, namely, to retire superannuated employees without forcing them upon charitable relief. The situation is met in part under the Retirement Act by assessing the industry, i. e., the carriers double the contribution of the employees, since obviously, it is the industry as a whole rather than its present younger employees that should bear the larger share of the cost for prior service. Under voluntary systems, generally, employers have assumed the full burden of prior service.

Giving all employees credit for prior service, irrsepective of contributions when determining their retirement benefits, has been found by long experience to be the best way out of a difficult situation. Furthermore, such inequities as may exist because of this method tend to eliminate themselves progressively as the retirement of the prevailing accumulation of superannuated employees proceeds.

V

By another provision of the Act those employees who have completed a service period of 30 years, but who have not yet reached age 65, may retire and receive an annuity benefit which shall be calculated by the method stipulated in Section 3 of the Act but which shall be reduced, except in the case of retirement for disability, by 1/18 for each year the employee is less than 65 on the date of his retirement. Thus, an employee 60 years of age, for example, who is eligible for retirement by virtue of having served 30 years, may so retire with the pension he would have gotten were he 65 reduced by 5/18 or 1/3. This arrangement is generally referred to as the "cut-back provision."

Its justification is to be found in the voluntary retirement opportunity which it gives to employees who have rendered 30 years service. There may always be some such employees whose retirement may be beneficial not only to themselves, but to the industry, and their retirement makes room for younger employees. In order, however, to compensate for the greater life expectancy of such employees as well as to discourage excessive retirement below 65, the cut-back feature was introduced.

It is not expected that many employees less than 65 years of age, thus eligible for retirement, will under the circumstances avail themselves of this opportunity. Cases, however, may arise in which, because of a combination of factors it may be advantageous that such employees retire. Even under the voluntary pension systems, retirement is frequently permitted to employees under the usual retirement age, who have served 25 years, and sometimes less. Since the retirement system is not financially burdened thereby, there is no good reason why this provision should not be made. Its operation will afford reemployment opportunities to a limited number of railroad men who are now unemployed, and will tend to infuse younger blood into the industry.

VI

The Retirement Act provides for pooling the funds of all the carriers and their employees necessary to meet the benefits to be granted retired employees by the Act and for the pooling of the employees' service periods. Every carrier and each employee is assessed a definitely calculable amount which is covered into a national fund or pool. The individual employee's monthly pay and the carriers' pay rolls are the basis upon which the contributions are calculated.

It is a recognized fact that the age distribution of employees in the oldest groups may vary by railroads. Some railroads in the past have retired their superannuated employees promptly, while others have kept them in service. Thus, because of failure in the past to retire its superannuated employees, a railroad may for the time being impose a liability upon the retirement fund or pool disproportionate to the contributions it and its employees make to the fund.

The pooling of the retirement fund for all railroads as provided by the Act and the centralization of administration appears to be the simplest and most effective way to operate a retirement system

for railroad employees. The barely possible alternatives involve great administrative burden and expense, antisocial consequences, and risks of insolvency. Principally, however, the pooling principle is necessary for the reason that there are a great many small carriers, the number of employees of each of which is too small to permit of a separate retirement plan for each carrier. While perhaps a few railroads in the past have been slow in retiring old employees and may not make a contribution to the fund directly proportionate to the liability arising against the fund because of this laxity, this is but a temporary situation which will disappear as soon as the surplus of superannuated employees from such railroads passes out of the picture. This will result fairly speedily because of the very age of the superannuated employees concerned.

Furthermore, giving the service period of employees credit for all time worked on railroads and not restricting this credit to the service period of the carrier of last employment, will also tend in a broad way to compensate for this temporary inequality, if it really exists. Thus, in reality a railroad company which may perhaps be paying into the fund more than a strict mathematical calculation would require it to do, may also have in its employ a substantial number of men who have had service on other railroads. Should this prove so, it would be a factor operating the other way and would tend to offset any inequities of the kind indicated.

VIII

One of the main difficulties in the way of realizing the benefits of railroad coordination as contemplated by the Emergency Transportation Act 1933, arises from the effect of such coordination on railroad employees. In recognition of this fact, more particularly in the light of the serious unemployment situation confronting the country as a whole, the Emergency Railroad Transportation Act further provided that the number of employees on any one railroad should not be decreased as a result of coordination substantially below the level of May 1933, nor should any railroad employee on the pay rolls of the railroads in May 1933, be in a worse position as to his compensation because of coordination. Since railroad traffic did not revive after the Act became law, little opportunity developed to launch actual measures of coordination. It could not be done without running foul of the labor limitations of the law. Thus, up to date it has not been practical to accomplish further substantial improvements in railroad efficiency and enonomy so definitely indicated by the Emergency Transportation Act.

It is generally accepted that if the railroad industry is to be rehabilitated and enabled to hold its own in competition with other methods of transportation, coordination is not only necessary, but is in the public interest. It was to achieve this purpose that the Emergency Transportation Act was enacted in 1933.

At the time this law was passed substantial benefits from coordination were visualized, and since its enactment the Federal Coordinator, in response to the duty placed upon him by the Act, i. e., to investigate and consider means of improving transportation conditions throughout the country, including the ability, financial or otherwise,

of the railroads to improve their properties, to furnish services and charge rates which will promote the commerce and industry of the country, as well as *to provide greater stability of railroad labor employment and other improvements in railroad labor conditions and relations*, has studied and prepared many plans which, when eventually placed in effect, will accomplish far-reaching benefits by way of further elimjnating railroad waste and improving railroad efficiency and service. Given a way to cushion the blow upon railroad labor due to these improvements, very substantial further savings in railroad operating costs become possible.

Under my direction, therefore, as Director of Labor Relations for the Federal Coordinator of Transportation, and with the advice and counsel of a committee of social scientists recruited from universities and other walks of life, a sincere effort has been made to formulate a balanced program of measures to safeguard the interests of railroad labor in railroad coordination. While this program is still in tentative form, being of necessity correlated to the larger measures of economic security for all industrial workers now under study and preparation by the President's Committee on Economic Security, it is clear that an indispensable part of the program consists of the systematic retirement of superannuated railroad employees with reasonable benefits.

The program visualizes a series of interdependent measures—of which an equitable national railroad retirement system is an indispensable part—as the most satisfactory permanent method for dealing with the consequences of coordination which will devolve upon labor.

The retirement phase of the program has now been made effective by the passage of the Railroad Retirement Act. While this may result in increasing the cost upon railroads of retiring superannuated employees, it will not follow to the extent which is feared by the railroads. First, the Act will result in removing from the pay rolls many superannuated employees who are no longer rendering useful service; second, it will enable the replacement of older and less efficient employees by younger and more efficient men; and, third, the Act also requires the railroad employees to contribute out of their pay to meet the costs incident to retirement. As against the possible increase in the retirement expense of the carriers, the Act, as part of a sound, long-range program to safeguard labor, will help to enable coordination to proceed without working undue hardship on labor. It thus constitutes a definite step forward in the direction of achieving future substantial railway economies through coordination. The additional expense to which the carriers may temporarily be subjected until coordination can proceed effectively, stands definitely to be fully absorbed when the savings sought through coordination and the like are realized.

In the circumstances, therefore, it is my opinion that the Railroad Retirement Act is in the interest of railroad rehabilitation.

(Signed) OTTO. S. BEYER.

Subscribed and sworn to before me this 4th day of October, 1934.

[SEAL] JOHN B. SWITZER, *Notary Public.*

My commission expires March 22, 1938.

Defendants' Exhibit 7

AFFIDAVIT

Filed October 10, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

MURRAY W. LATIMER, being first duly sworn, deposes and says:

I am the Murray W. Latimer who has made another affidavit dated this day in this cause, and have the qualifications in said affidavit set forth as an expert in the field of industrial pensions and retirement insurance.

This affidavit presents an actuarial calculation of such pension costs under the Railroad Retirement Act as are attributable to service rendered prior to the effective date of the Act; for purposes of comparison a similar calculation is then made of the corresponding cost which would be incurred under the voluntary pension plans in effect on the various railroads.

The allocation of a portion of pension costs to prior service follows actuarial and accounting principles rather than any theory implicit in the Railroad Retirement Act. Under the terms of the Act the part of the annuity relating to prior service and that relating to future service are to a large degree indistinguishable. The Act provides for the payment of annuities and prescribes a method for their calculation in which the period of service up to thirty years is an important factor. But it makes no statement as to how much of the annuity payments is in respect of service rendered prior to August 1, 1934, the effective date of the Act, and how much is in respect of subsequent services. The method of calculation is merely a convenient way to attempt to deal equitably as between employees. The benefit might have been framed as a broad percentage of the pay, or as a flat amount without reference to period of service. Instead, the Act makes the amount of the annuity dependent in part upon length of service. Exact separation of the period of service into two parts, each representing separate accruals of benefits, is impossible except within rather broad limits.

Nevertheless, irrespective of the precise legal definition of the time in which rights to benefits accrue, under well recognized actuarial and accounting procedure, the cost of a benefit, such as a retirement benefit, is ordinarily spread over the whole period of an employee's service. It is upon this theory that an allocation of a portion of the cost to prior service is made. The difficulties encountered in making such an allocation, and the method of resolving them are fully discussed below under "Method of Calculating Prior Service Cost."

1. *The data used.*—(*a*) Average compensation.

As a member of the staff of the Federal Coordinator of Transportation I directed the analysis of material collected from fourteen important railway companies scattered throughout the United States, for the purpose of preparing estimates of the cost of retirement insurance on Class I railways of the United States. The following

data apply only to Class I carriers. Among the data collected were the ages and occupations and annual incomes of railway employees on the above-mentioned fourteen carriers in the years 1924 to 1933, inclusive.

This information has been classified for use in estimating costs under the Railroad Retirement Act. The Act provides that annuities payable to employees retiring under the Act shall be based on the average monthly compensation paid to them by the carrier, provided that where applicable for service prior to the Act, monthly compensation is to be the total amount of the compensation received in the eight years 1924 to 1931, inclusive, divided by the number of months in which compensation was received in that period. Accordingly, for all employees, where such data were available, the average compensation was computed for the eight-year period and these employees were classified by age and length of service so as to differentiate between employees of different ages. Such differentiation is necessary not only since prior service credit will be lower for younger employees, because of shorter service, but also because income in later years is generally higher. These classifications and computations were made by methods in common use among actuaries. The salary scale arrived at is appended hereto and marked "Exhibit."

(*b*) Numbers of employees, periods of service, and age groups.

As a basis for determining the amount of payments to be made, the table showing ages and periods of service of railway employees collected by Dr. Julius H. Parmelee, and reproduced in all the hearings which were concerned with railway pension legislation in the 72nd and 73rd Congresses, was used. In order to determine the number of individuals included in this table who will receive an annuity, the numbers given in the Parmelee table were reduced by mortality according to the American Men Table (ultimate rates), a standard insurance table of mortality.

The number of railway employees, as shown by the Parmelee table, totals to 1,215,897, as compared with 1,043,817, the number of employees of Class I carriers, as reported to the Interstate Commerce Commission for July 1934. Use of the Parmelee table probably exaggerates the actual costs, even allowing for mortality since the date of the Parmelee table and withdrawals since June 27, 1933, unless some former employees with prior-service credits should ultimately be taken into the service.

2. *Method of calculating prior-service costs.*—As stated above, under established actuarial and accounting procedure the cost of a retirement benefit is ordinarily spread over the whole period of an employee's service. Consequently, where, as under the Railroad Retirement Act, a maximum limit of service creditable in the calculation of annuities is fixed (thirty years), the allocation of a portion of the annuity to prior service requires a prediction of the total length of service. But under the Railroad Retirement Act, since employees may retire upon the completion of thirty years of service, or remain in the service much longer, it is impossible to predict the exact length of service. If it is assumed that retirement in all cases will be deferred to age 65 or later, and that the current

contributions after the effective date of the Act will pay for such subsequent services, but the service period is creditable only up to a maximum of thirty years in the calculation of an annuity, the amount of prior service to be included in the computation of the annuity would be the period between the age of the employee upon the beginning date of the Act and age 65 subtracted from thirty years. On the other hand, if it is to be assumed that employees will retire as soon as possible, the prior-service period should be credited toward the annuity in full to the maximum of thirty years. In the calculations which follow, the middle ground has been taken, and it has been assumed that employees would not retire prior to age 65, but where potential service at age 65 is in excess of thirty years, both prior and subsequent services have been reduced by the ratio of potential service in excess of thirty to the total services. Thus if an employee entered the service at age 20 and had, on the effective date of the Act, service of fifteen years, the prior-service period credited was ten years, since the potential service is one-third in excess of the maximum creditable service.

The percentages specified in the Act were applied to the appropriate average wage for the period 1924 to 1931, and these were multiplied by the number of years of credited service in each age group. The number of persons reaching age 65 was determined by application of the mortality table above referred to, and the number of survivors was multiplied by the total benefit. The number of persons retiring on annuity each year, 1935 and subsequently, was determined by adding together the number of persons reaching 65 in each of the years after varying lengths of service. The payments subsequent to retirement were calculated on the assumption that mortality among the annuitants would follow the ultimate rates of the American Men Table of mortality. It was assumed, further, that all persons age 65 and over, upon the beginning of annuity payments under the Act, would retire immediately.

The method of calculation of amounts payable for annuities in respect of service rendered prior to August 1, 1934, assumes that compensation during subsequent service will be approximately the same as for prior service. Under pay levels existing at the present time, at any rate, this assumption tends to exaggerate the amount of annuity payable with respect to prior service. Hence the total amount of annuity may be reduced rather than increased by reason of the subsequent service, or may not increase pro rata to pay for subsequent service even when reduced as explained above.

3. *Results of the calculations thus made.*—The following tabulation shows the amounts of annuity which would be payable each year from 1935 to 2016 on the assumptions stated above in respect of service rendered prior to 1935. These payments represent the maximum load in respect of prior service which can possibly arise if all persons retire and enter upon an annuity at age 65. Payments in respect of subsequent service will not be of consequence for several years after 1935.

Calendar year	Amount	Two-thirds as the carriers' contribution	Calendar year	Amount	Two-thirds as the carriers' contribution
1935	$68, 749, 000	$45, 833, 000	1977	$32, 280, 000	$21, 520, 000
1936	75, 037, 000	50, 025, 000	1978	28, 162, 000	18, 775, 000
1937	81, 559, 000	54, 373, 000	1979	24, 395, 000	16, 263, 000
1938	86, 866, 000	57, 911, 000	1980	21, 016, 000	14, 011, 000
1939	92, 034, 000	61, 356, 000	1981	17, 999, 000	11, 999, 000
1940	96, 828, 000	64, 552, 000	1982	15, 323, 000	10, 215, 000
1941	102, 295, 000	68, 197, 000	1983	12, 981, 000	8, 654, 000
1942	106, 247, 000	70, 831, 000	1984	10, 900, 000	7, 267, 000
1943	110, 576, 000	73, 717, 000	1985	9, 094, 000	6, 063, 000
1944	114, 635, 000	76, 423, 000	1986	7, 532, 000	5, 021, 000
1945	118, 705, 000	79, 137, 000	1987	6, 185, 000	4, 123, 000
1946	121, 950, 000	81, 300, 000	1988	5, 041, 000	3, 361, 000
1947	126, 004, 000	84, 003, 000	1989	4, 070, 000	2, 713, 000
1948	128, 965, 000	85, 977, 000	1990	3, 255, 000	2, 170, 000
1949	132, 327, 000	88, 218, 000	1991	2, 575, 000	1, 717, 000
1950	134, 137, 000	89, 425, 000	1992	2, 014, 000	1, 343, 000
1951	136, 204, 000	90, 803, 000	1993	1, 557, 000	1, 038, 000
1952	136, 469, 000	90, 979, 000	1994	1, 196, 000	797, 000
1953	137, 435, 000	91, 623, 000	1995	896, 000	597, 000
1954	136, 842, 000	91, 228, 000	1996	665, 000	443, 000
1955	135, 095, 000	90, 063, 000	1997	486, 000	324, 000
1956	133, 232, 000	88, 821, 000	1998	348, 000	232, 000
1957	131, 086, 000	87, 391, 000	1999	245, 000	163, 000
1958	127, 503, 000	85, 002, 000	2000	169, 000	113, 000
1959	123, 659, 000	82, 439, 000	2001	113, 000	75, 000
1960	119, 067, 000	79, 378, 000	2002	74, 000	49, 000
1961	114, 727, 000	76, 485, 000	2003	47, 000	31, 000
1962	110, 050, 000	73, 367, 000	2004	29, 000	19, 000
1963	105, 406, 000	70, 271, 000	2005	17, 000	11, 000
1964	99, 928, 000	66, 619, 000	2006	10, 000	7, 000
1965	94, 378, 000	62, 919, 000	2007	5, 000	3, 000
1966	89, 238, 000	59, 492, 000	2008	3, 000	2, 000
1967	83, 898, 000	55, 932, 000	2009	1, 000	(1)
1968	77, 917, 000	51, 945, 000	2010	(1)	(1)
1969	71, 633, 000	47, 755, 000	2011	(1)	(1)
1970	66, 135, 000	44, 090, 000	2012	(1)	(1)
1971	59, 610, 000	39, 740, 000	2013	(1)	(1)
1972	54, 080, 000	36, 053, 000	2014	(1)	(1)
1973	48, 552, 000	32, 368, 000	2015	(1)	(1)
1974	43, 249, 000	28, 833, 000	2016	(1)	(1)
1975	38, 268, 000	25, 512, 000			
1976	36, 691, 000	24, 461, 000		4, 415, 949, 000	2, 943, 966, 000

[1] Payments made but less than $1,000.

In addition to the payments for annuities there will be death benefits in the form of refunds of employee contributions with interest at three percent per annum to the date of death. In the early years of the Act's operation these payments will be small, but over a long period they may be twenty percent of the employee contributions, according to tentative calculations which I have made.

The assumption that all employees will retire at age 65 is too simple. There will be some who will retire before 65; others will retire at 65, some between 65 and 70, and some at 70. In the first few years of the Act's operation some officials will undoubtedly delay retirement until after 70.

Where persons retire on reduced annuity under age 65, the reduction in amount is such as to offset the greater longevity. In those cases where there is no reduction the retirement being caused by physical or mental inability to remain in active service, longevity will be probably shorter after retirement than after age 65 for persons retired normally. The effect of variation in retirement ages from those assumed herein will almost certainly result in annuity payments below the estimates made above and by an amount sufficient to offset, or more than offset, the payments of death benefits.

Since, under the Act, employees pay for one-third of the total cost of both annuities and death benefits, it is reasonable to estimate the burden on the carriers in respect of prior service will not exceed two-thirds of the cost of the estimated annuity payments on the assumption of immediate retirement of persons 65 and over as soon as payments begin under the Act, and uniformly at age 65 thereafter; and a column indicating that cost burden has been inserted in the estimate of expenditures. In the aggregate, therefore, the burden on the carriers in respect of prior service would be approximately $2,944,000,000, spread out over a long period. The present value of these payments, at three-percent interest compounded annually, will be, as of the first of 1935, approximately $1,720,000,000.

4. *Comparison with prior service cost under voluntary plans.*—In the investigation for the Federal Coordinator of Transportation, referred to above, calculations were made of the period 1925 to 1928 as to the probability of withdrawal from service of persons of various ages and service periods. This period was regarded as one in which employment conditions were reasonably normal. Application of these probabilities to the Parmelee table would indicate how many employees would remain in service to the average age of retirement under voluntary pension systems in effect on railroads (about age 68), and show how many persons would receive an annuity, provided that the voluntary pension plans now in effect on the railroads were to be continued. These probabilities have in fact been applied to the Parmelee table and the pension for such persons was calculated on the assumption that the 1924–1931 average for the several age groups would represent the future compensation earned by employees in each of the age and service groups, which assumption, in view of previous experience, would tend to understate the amounts of annuity payable under the present pension plans. The benefit was assumed to be one percent of such compensation for each year of service. Since, under existing voluntary plans, all service is creditable, the total prior service period was credited toward the annuity. The amounts payable in each year from 1935 to 2015 under voluntary plans, in respect of service prior to 1935, assuming eighty-five percent of the employees of the Parmelee table were covered, and, further, that mortality would follow the ultimate rates of the American Men table would be as follows:

Calendar year:	Amount	Calendar year:	Amount
1935	$7,754,000	1951	$36,694,000
1936	12,574,000	1952	37,044,000
1937	16,743,000	1953	37,563,000
1938	20,257,000	1954	37,521,000
1939	22,765,000	1955	37,078,000
1940	25,344,000	1956	36,800,000
1941	27,156,000	1957	36,142,000
1942	28,706,000	1958	35,828,000
1943	30,274,000	1959	34,870,000
1944	31,675,000	1960	33,951,000
1945	32,538,000	1961	32,625,000
1946	33,489,000	1962	31,261,000
1947	34,260,000	1963	30,388,000
1948	35,424,000	1964	28,980,000
1949	35,853,000	1965	27,466,000
1950	36,458,000	1966	26,038,000

Calendar year:	Amount
1967	$24,415,000
1968	23,574,000
1969	22,110,000
1970	20,570,000
1971	18,926,000
1972	17,184,000
1973	15,906,000
1974	14,309,000
1975	12,939,000
1976	11,580,000
1977	10,245,000
1978	9,008,000
1979	7,890,000
1980	6,657,000
1981	5,769,000
1982	4,877,000
1983	4,097,000
1984	3,414,000
1985	2,820,000
1986	2,313,000
1987	1,881,000
1988	1,514,000
1989	1,207,000
1990	952,000
1991	742,000
1992	573,000
1993	437,000
1994	$328,000
1995	243,000
1996	178,000
1997	128,000
1998	91,000
1999	63,000
2000	43,000
2001	29,000
2002	19,000
2003	12,000
2004	7,000
2005	4,000
2006	3,000
2007	2,000
2008	1,000
2009	(1)
2010	(1)
2011	(1)
2012	(1)
2013	(1)
2014	(1)
2015	(1)
Total	1,218,639,000

The additional burden imposed by the Railroad Retirement Act should be measured against the liability which the railroads have voluntarily incurred, and, taking only the excess, the aggregate total indicates an additional burden, expressed in terms of dollars, payable at various times in the future, of approximately $1,700,000,000. The time of these payments is spread over a long period of years, and the maximum burden, in respect to prior service, in any one year is indicated at not more than $55,000,000. This excess is appreciably less than two percent of operating revenues, even at the low point of 1932.

The cost of a pension plan expressed in terms of dollars is no final criterion of the actual burden upon the carriers. The amounts of dollars expended, in the first place, is relative to the revenues of the carriers; in the second place, the net burden should take into account expenses which would be incurred in the absence of a pension system, particularly in the way of paying compensation to aged employees who would be retained on the pay rolls in the absence of any pension system, or an ineffective pension system.

Experience in industries other than the railroads indicates that such payments would involve substantial sums and might indeed in some instances exceed the amount of annuities by so large a sum as to make the annuity payments practically cost free. The amount of these savings in the pay roll, made possible by the operation of an annuity system, is not subject to precise measurement. Finally, the inauguration of a sound and secure pension system produces a feeling of security among employees which will almost without question have effect on their efficiency, and thus bring about economy in cost which would be attributable directly to the operation of the

[1] Payments made but less than $1,000.

pension system. It seems reasonable to suppose, also, that the operation of a jointly supported system of old age insurance, such as is created by the Railroad Retirement Act, would improve relationships between carrier employees and their employers, which in itself would be a beneficial factor, and would improve the morale of employees and ultimately make for more economical operation of the transportation system of the country.

That the percentages of compensation of employees payable by employees and the carriers do not, at least initially, constitute an unreasonable burden is indicated by comparing the percentages fixed by the Act with contributions payable under compulsory retirement systems in other countries. In Argentine railway employees pay five percent of their wages up to 1,000 pesos ($719 at par), their first month's pay, and the first month's increase. The employing carriers pay 8 per cent of the same pay base. Contributions at the same rate are levied on employees and employers in the public utility and banking industries, except that in the latter the maximum compensation is 1,500 pesos and the contribution on that part of the pay from 1,000 to 1,500 pesos is seven percent. In Belgium, under the miner's and salaried employee's compulsory old age insurance systems, employees pay three percent and the employers four percent of the payroll. In addition there are governmental grants. Under the Cuban system, covering employees of railroads and street railways, employees pay three percent of their pay, the whole first month's pay, and the first month's increase in pay; and the employers pay two percent of the pay rolls. In France under the system of compulsory retirement insurance for wage earners, and salaried employees of railways, employees pay five percent of their pay, the whole of the first month's pay, and the first month's increase in pay, and the employers pay fifteen percent of the pay rolls. Persons engaged in maritime pursuits, except officers, pay five percent of their wages, employers contribute three and one-half percent, and there are also government contributions. In the scheme covering workers in mines and quarries the employees and employers pay five and one-half percent of the wages while the government contributes four and one-half percent.

In Germany, in the miner's insurance, employees pay from 5.1 to 7.9 percent of their pay while the employer pays from 3.4 to 5.3 percent, with the government also contributing a large amount.

In a number of retirement insurance plans the benefits are expressed in flat amounts, both with the employer matching the employee and with the State also making contributions sufficient to pay any necessary requirement. In the large majority of these cases it is impossible to get a cost figure which would be useful for comparison with the assessments under the Railroad Retirement Act.

Under the plans for which specific cost figures were given above, benefits are frequently payable before age 65 and there are risks other than old age provided for. In particular, the French railway plan provides for retirement ages of 50 and 55, and further that surviving wife or children are to receive one-half the benefit of a deceased annuitant. I am not prepared to say whether the contributions assessed are proper. The sole purpose of presenting the figures is to indicate

that, judged by the assessments now being made under the systems of other countries having a similar purpose to the Railroad Retirement Act, the burdens imposed upon the carriers by that Act are not unreasonable.

MURRAY W. LATIMER.

Subscribed and sworn to before me this fifth day of October 1934.

[SEAL] WILLIAM B. RICHARDSON,
Notary Public.

My commission expires Jan. 14, 1939.

EXHIBIT.—*Prior service salary scales*

I. ENTRY YEARS 1924–31

Central age at entry	Year of entry							
	1931	1930	1929	1928	1927	1926	1925	1924
13	$585	$652	$729	$797	$851	$931	$1,029	$1,158
18	690	776	875	964	1,045	1,129	1,213	1,310
23	895	997	1,088	1,164	1,252	1,363	1,432	1,521
28	1,107	1,152	1,191	1,285	1,345	1,456	1,537	1,630
33	923	1,127	1,220	1,292	1,402	1,509	1,617	1,673
38	1,097	1,122	1,146	1,240	1,281	1,391	1,488	1,614
43	1,048	1,212	1,128	1,244	1,405	1,400	1,502	1,599
48	1,111	1,027	999	985	1,236	1,058	1,349	1,438
53	1,233	1,497	1,203	1,181	1,258	1,208	1,266	1,472
58	1,715	1,209	1,370	1,308	1,363	1,340	1,313	1,721
63	2,911	1,385	1,290	1,414	1,899	1,323	1,370	1,536

II. ENTRY YEARS 1923 AND PRIOR

Year of birth	Salary scale	Year of birth	Salary scale	Year of birth	Salary scale
1911	$1,535	1888	$2,091	1865	$2,509
1910	1,450	1887	2,114	1864	2,657
1909	1,400	1886	2,154	1863	2,662
1908	1,314	1885	2,156	1862	2,951
1907	1,317	1884	2,186	1861	2,660
1906	1,352	1883	2,218	1860	3,247
1905	1,395	1882	2,197	1859	3,192
1904	1,457	1881	2,224	1858	4,126
1903	1,516	1880	2,232	1857	2,773
1902	1,588	1879	2,220	1856	3,437
1901	1,623	1878	2,225	1855	3,430
1900	1,665	1877	2,259	1854	2,661
1899	1,726	1876	2,261	1853	2,830
1898	1,792	1875	2,268	1852	3,680
1897	1,806	1874	2,282	1851	3,505
1896	1,845	1873	2,292	1850	3,390
1895	1,889	1872	2,258	1849	3,320
1894	1,909	1871	2,289		
1893	1,931	1870	2,319		
1892	1,966	1869	2,380		
1891	2,030	1868	2,362		
1890	2,046	1867	2,376		
1889	2,068	1866	2,391		

Defendants' Exhibit 8

AFFIDAVIT

Filed October 10, 1934

CITY OF WASHINGTON,
District of Columbia, ss:

CHARLES E. BROOKS, being first duly sworn, deposes and says:

That deponent makes this affidavit at the request of the above-named defendants and with a knowledge that it is to be filed in the above-entitled cause.

At the request of counsel deponent states his qualifications as an actuary and expert on matters relating to pensions and retirement systems. That he now is and has been a consulting actuary located at Madison, Wisconsin, since 1921, and immediately prior thereto was the actuary of the Carnegie Foundation in the reorganization of its original pension plan for college professors, and in the establishment by the Carnegie Corporation of the present Teachers' Insurance and Annuity Association; that prior thereto, as actuary, he assisted in the establishment of the War Risk Insurance for soldiers and sailors during the World War; that he served as professor of insurance in the University of California, and taught insurance and mathematics at Northwestern University, and previously did actuarial work in the home offices of a large and a small life insurance company; that he is a graduate of Johns Hopkins University, and studied economics and mathematics at Johns Hopkins University and Harvard University and holds the degree of Ph. D. from Johns Hopkins University; that he is a member of the American Institute of Actuaries, The Fraternal Actuarial Association, and of other economic and scientific associations; that he is now actuary for the Wisconsin State Retirement System and for the Minneapolis Teachers' Retirement Fund Association and also for the Railroad Employees' National Pension Association, and consulting actuary in the investigation of other pension and retirement funds; that during two years last past he has been employed by said Railroad Employees' National Pension Association in investigations and studies connected with the proposed pension legislation which resulted in the enactment of the present Railroad Retirement Act.

That he is familiar with the general practice and experience in matters relating to pension and retirement provisions on account of age and disability for persons in public and private service, and with reports and literature relating to the subject.

The following statements and the computations therein referred to and made by deponent are true and correct:

Data.—Railroad Retirement Act:

Table showing attained age and years of service in 1932 of 1,215,897 employees including officers of 129 Class 1 railway systems. Exhibit No. 1, by Dr. Parmelee, Hearings January 1933, on S. 3892 and S. 4646. (Insert p. 244.)

Group Annuitants Mortality Table (T. A. S. A. Vol. 29, p. 123).

Disbursements for annuities determined on service prior to effective date.—Disbursements for annuities under the provisions of the

Railroad Retirement Law applied to 1,215,897 employees, age and service in 1932, as shown in a table by Dr. Parmelee dated October 15, 1932, corrected to January 23, 1933, and named Exhibit No. 1, in the printed report of hearings before a sub-committee of the Senate Committee on Interstate Commerce, January 1933, on S. 3892 and S. 4646, all of said 1,215,897 employees to be continuously employed in the service of the carrier from 1932 until death or retirement, either at the effective date at ages 65 or over, or at age 65 thereafter, when annuity payments are to begin immediately. Annuities based upon $2,000 annual compensation.

Information obtained from the Bureau of Railway Statistics of the Interstate Commerce Commission, gives the number of employees in service for July 1934 as:

Class 1	1,048,817
Express Company (railroad)	33,237
Express Company	1,513
Pullman Company	19,142
Total	1,102,709

This is a materially smaller total number of employees than the 1,215,897, total number of employees given in Dr. Parmelee's table for 129 Class 1 railroads. The present total of 1,102,709 employees includes with Class 1 railroads, Pullman and Express Company employees and officers. The excess of 113,188 employees provides a reasonable margin for persons not included in the data who may qualify under the retirement law.

I

Total annuity payments determined on service prior to effective date

Age in 1935	Number in 1932	Number enter on annuities	Total payments
66 years or over	75,493	66,277	$561,090,000
37 to 65	847,199	625,329	3,013,387,000
20 to 36	293,205	197,500	None
All ages	1,215,897	889,106	3,573,383,000

II

Present value of total annuity payments.—With interest at three and one-half percent per annum, the present value at the effective date, of annuity payments of $3,575,383,000 as above, payment distributed through a period of 80 years after 1934, is approximately $2,145,230,000. This $2,145,230,000 for accumulated human depreciation may be compared with $2,294,804,349 which is reported by the railroads as of the end of 1933 for accrued depreciation of equipment. (Interstate Commerce Commission, Statistics of Common Carriers, Preliminary Statement, year ended Dec. 31, 1933, p. 7, Item 30.)

If, throughout the past thirty years during which the service was being performed, $41,556,000 yearly had been provided and accumulated at 3½% interest there would now be on hand the full amount

of $2,145,230,000 for the payment in full of the annuities determined on that service. That $41,556,000 is less than 1% of an average operating revenue of $4,245,000,000 annually derived from the total operating revenue of $127,346,000,000 for the thirty years ended with 1933.

III

Contributions and accumulations for annuities to these employees have not been made in the past and there is no $2,145,230,000 or other large sum now available to provide in advance for the annuities which must be paid under the Act. The funds to provide for the annuities determined upon this service must therefore come from future current payments for that purpose as provided in the Act.

The yearly annuity payments for years 1935 to 1944, inclusive, for annuities determined on basis of service prior to effective date are:

Calendar year:	Payments of year	Calendar year—Continued.	Payments of year
1935	$63,948,000	1935	$93,732,000
1936	69,850,000	1941	99,013,000
1937	76,989,000	1942	102,823,000
1938	82,800,000	1943	103,740,000
1939	88,497,000	1944	106,855,000

IV

The average period of service prior to 1934 applied in the determination of annuities is as to each age group, by each calendar year of birth, the average of total service, not in excess of thirty years from entry to retirement at age 65, less the total service, not in excess of thirty years, after 1934 to retirement at age sixty-five. With respect to the assumption of continuous employment after the effective date, until retirement at age 65, the data shows that on this assumption the average total service to retirement for all age groups older than 65 in 1935, is 25.60 years. For the age groups 56 to 65 in 1935, which will retire at 65 during the ten years 1935 to 1944, the average total service to retirement is 26.8 years. Approaching the lower ages, the total service to age 65 increases gradually, with fractional irregularities to 29.75 for age 45, and 30 years, the maximum which can be credited, for ages 40 or lower.

It follows that with respect to retirements during the next thirty years, the average annuity will be materially less than that based on the maximum thirty years' service credit. A very considerable number of individuals have sufficient prior service to permit them to leave the service at ages below 65 with the maximum thirty years' service credit. An approximately equal number will fall short of thirty years' service credit at sixty-five, and will have a motive for delaying their retirement beyond age 65, in order to obtain the maximum annuity. The low ratio of annuity to compensation provided by the Act may reasonably be expected to tend toward delayed, rather than toward early, retirement.

V

Total annuity payments, consisting of payments on annuities determined on services prior to and subsequent to the taking effect of the Act, for the ten calendar years 1938 through 1944 will be as shown below:

Calendar year	Annuity payments of year determined on service		Total	Calendar year	Annuity payments of year determined on service		Total
	Prior to effective date	Subsequent to effective date			Prior to effective date	Subsequent to effective date	
1935	$63,948,000	$405,000	$64,353,000	1940	$93,732,000	$9,289,000	$103,021,000
1936	69,850,000	1,153,000	71,003,000	1941	99,013,000	12,848,000	111,861,000
1937	76,989,000	2,522,000	79,511,000	1942	102,823,000	16,590,000	119,413,000
1938	82,860,000	4,233,000	87,093,000	1943	103,740,000	24,618,000	128,358,000
1939	88,497,000	6,494,000	94,991,000	1944	106,855,000	30,627,000	137,482,000

The foregoing does not include the amount of employee payments which are required to be refunded on death of employees before these have been returned in annuity payments. During the tenth year above mentioned these refunds will not exceed an aggregate sum of $8,000,000.

The differences between the results stated in this affidavit and those stated in the affidavit of Murray W. Latimer, dealing with the amounts of annuity payments, are substantially accounted for by differences in the data used and in the allocation between the service before and the services after the taking effect of the Act, which are stated in each affidavit. In deponent's opinion, by adjustment for differences in data and assumptions and method of allocation as set out in the two affidavits, the computations and results stated therein are reconcilable.

(Signed) CHARLES E. BROOKS.

Subscribed and sworn to before me this third day of October 1934.

[SEAL] (Signed) NELL W. GRIFFIN,
Notary Public, D. C.

Defendant's Exhibit 9

96806—34——15

UNITED STATES DEPARTMENT OF LABOR
FRANCES PERKINS, Secretary

BUREAU OF LABOR STATISTICS
Isador Lubin, *Commissioner*

CHILDREN'S BUREAU
Grace Abbott, *Chief*

WOMEN'S BUREAU
Mary Anderson, *Director*

EARNINGS AND STANDARD OF LIVING OF 1,000 RAILWAY EMPLOYEES DURING THE DEPRESSION

BY

CARTER GOODRICH, Ph.D.

UNITED STATES
GOVERNMENT PRINTING OFFICE
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LETTER OF TRANSMITTAL

UNITED STATES DEPARTMENT OF LABOR,
Washington, May 22, 1934.

MADAM: Eighteen of the "standard railway unions", namely, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen; Switchmen's Union of North America; Order of Railroad Telegraphers; American Train Dispatchers' Association; International Association of Machinists; International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America; International Brotherhood of Blacksmiths, Drop Forgers, and Helpers; Sheet Metal Workers' International Association; International Brotherhood of Electrical Workers; Brotherhood of Railway Carmen of America; International Brotherhood of Firemen and Oilers; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen of America; National Organization Masters, Mates and Pilots of America; National Marine Engineers' Beneficial Association; Order of Sleeping Car Conductors, undertook a year ago to find out the facts as to the effects of the depression on their members who had been employed.

A technical advisory committee was appointed as follows: Carter Goodrich, professor of economics, Columbia University; Joseph Willits, dean, School of Commerce, University of Pennsylvania; Meredith Givens, secretary, Social Science Research Council; Helen R. Wright, associate professor, School of Social Service Administration, University of Chicago; William Leiserson, professor of economics, Antioch College; Howard Odum, professor of sociology, University of North Carolina; Isador Lubin, then of the Brookings Institution; and Grace Abbott, Chief, Children's Bureau, United States Department of Labor. Otto S. Beyer, consulting engineer, Railway Employees Department, American Federation of Labor, was in general charge of the investigation for the unions. This advisory committee met and agreed on the general scope of the study, the schedule to be used, and the instructions and qualifications for investigators.

In the summer of 1933 the United States Department of Labor was asked to assist in the study. This was done, and a committee composed of the heads of the Children's Bureau, the Bureau of Labor Statistics, and the Women's Bureau was placed in charge for the Department. Investigators from these three Bureaus, together with those employed by the unions—all the latter were trained investigators, and none of them were trade-union members or previous employees of trade unions—worked together. The tabulations were made by the Statistical Division of the Children's Bureau, and the

preliminary analysis of the material was made by Mary Skinner, also of the Children's Bureau. The report was written by Professor Goodrich. It is, therefore, the joint product of the railway unions, the technical advisory committee, and the Department of Labor.

Respectfully submitted.

GRACE ABBOTT, Children's Bureau,
ISADOR LUBIN, Bureau of Labor Statistics,
MARY ANDERSON, Women's Bureau,
Department committee.

HON. FRANCES PERKINS,
Secretary of Labor.

Home of a section laborer before the depression. This cottage had gas, electricity, bath, and a garage.

Present home of the same section laborer. This shack, which belongs to the county, was vacant a year or more before this family rented it. It lacks all conveniences, even city water.

EARNINGS AND STANDARD OF LIVING OF 1,000 RAILWAY EMPLOYEES DURING THE DEPRESSION

SUMMARY OF FINDINGS

This investigation attempted to determine the effect of the depression upon the families of employed railway men and to obtain information that might in some measure be comparable with the more easily available data on the condition of the carriers as business enterprises. For this purpose experienced field agents interviewed a thousand families. The cases chosen were from 18 localities in all parts of the country and represent in their proper proportions all major groups of employees in the railway service except locomotive engineers, conductors, and longshoremen, whose unions preferred not to cooperate in the study. Every effort was made to see to it that the selection of families should not overweight either the cases of extreme hardship or those of exceptional good fortune. One bias, however, was inherent in the data. Any body of workers who still held their jobs in the worst months of 1933 was necessarily a picked group, and on the railroads the practices of seniority made it certain that these men would be relatively old in years and in service. Sixty-four percent of the railway men interviewed were at least 40 years of age. The record of continuous service for the group was as follows: Three-fourths had at least 10 years' seniority, one-half had at least 15 years' seniority, and one-fourth had at least 20 years' seniority.

To these men the depression had brought a much larger reduction in income than is generally realized. In this reduction the 10-percent cut in wage rates played a smaller part than the losses due to a shrinkage in the amount of employment. Short time had been almost universal, and an unusually large proportion of the men—more than a third—had suffered demotions resulting from the elimination of many of the better-paid positions. In comparing earnings reported in July 1929 and in April 1933, therefore, what was found was not a 10-percent decrease but the following: Two-thirds had suffered reductions of at least 20 percent, and one-half had suffered reductions of at least 30 percent.

Resulting earnings stood at a low level. For the year 1932 two-thirds had received less than $1,500, three-eighths had received less

than $1,000, and one-tenth had received less than $500. Only 18 percent had received as much as $1,750. Total family incomes were not much higher. In the majority of cases the earnings of the chief breadwinner, occasionally pieced out by odd jobs outside the industry, were the sole support of the family. Even where other members still had work, as they did in about a quarter of the cases, and even in the smaller number of households that received income from miscellaneous investments, from property rents, or from boarders and lodgers, the sums added were usually very small. When all these sources are reckoned in, except the last two, which could not be reduced to net figures, hardly more than a quarter of the family incomes were as high as $1,750, and nearly 60 percent failed to reach $1,500.

The investigation made particular efforts to determine how the railway men and their families managed to live on these shrunken incomes. Two facts were at once apparent. They certainly had not done it by cutting down their obligations. Instead many gave cash or groceries to needier families, and more than a fifth took into their homes relatives or friends who had lost their regular means of support. Nor had they done it by increased dependence on outside help. Only 72 had received relief from public or private agencies, and such social services as they had been in the habit of using were more often curtailed than expanded.

The expedients to which they *did* resort are recorded in detail in the schedules and case histories on which the report is based. The stories they tell are of educational opportunities abandoned and health needs neglected, and of lives stripped bare of even the most inexpensive forms of recreation and social life. Frequently they describe the crowding of families into inferior accommodations, and few fail to record the use of shabby clothing or to note the items of a rough and meager diet. Even these economies, moreover, were not enough to maintain the solvency of this unusually stable group of workmen. Frequently they had entered the depression with substantial savings, and more than half owned or were buying their homes. By the time they were visited, however, two-fifths of these were in arrears on their payments and 44 owners had lost their homes. Cash savings were virtually exhausted, and no less than half of the histories reported the sacrifice of insurance policies. Yet in spite of all these efforts, 60 percent of the 730 families for which information could be obtained had gone seriously into debt.

For these veteran railway men, then, in a well-organized and thoroughly regulated industry, the study records a slow retreat from relative security toward destitution.

PLAN OF THE STUDY

PROBLEM AND METHOD

The literature of depressions tells much more about the unemployed than about those who kept their jobs. That is, of course, natural, and the effect is to show the tragic consequences of industrial fluctuation at their worst. The present study, however, follows the opposite plan. It is concerned not with the unemployed, but with a body of the employed, and with one that has been by no means the least favored. American railway men have had the advantages of membership in one of the strongest groups of unions in the country and of a considerable measure of governmental protection. Whatever their place in the recovery program, they certainly fared better than most workers during the depression itself. Indeed, it might even be assumed that a body of workers whose wage rates were cut by a percentage less than that of the fall in the cost of living had actually been gainers by the industrial decline. Of that assumption the present investigation provides the test. How near the truth it is or how far from it will appear in the text and tables that follow.

Up to the time of this investigation much evidence had been gathered as to the effect of the depression on railroads as business enterprises. In particular, the figures on wages and employment published monthly and yearly by the Interstate Commerce Commission had revealed the prevalence of short time and drastic curtailment of pay rolls. The total compensation paid railway workers, including wages of both part-time and full-time employees, had dropped 28 percent in 1932 as compared with 1931; 18 percent in 1931 as compared with 1930; and 12 percent in 1930 as compared with 1929.[1] The total decrease in the 4-year period was 48 percent. Little or no information was at hand, however, that would help to translate these losses into the terms of their consequences of family well-being. Only a study of individual cases could attempt to do this. The present investigation, therefore, studies these reductions in detail among a representative group of railway men, and it goes further and along somewhat less usual lines to ask questions as to the consequences. On the one hand, it attempts to learn what increased burdens and responsibilities the depression has placed upon these railway men, and on the other hand, it tries to explore the expedients and the sacrifices to which their families have resorted in the attempt to meet these larger demands with smaller pay envelops. It thus becomes not merely a study of income changes but an analysis of the modifications in the standard of living under the impact of the emergency.

[1] Wage Statistics; class I steam railways in the United States, including large switching and terminal companies, for 12 months ended with December 1932. Same, 1931. Interstate Commerce Commission, Bureau of Statistics. Statement No. M–300. Washington.

Field work was begun in May 1933 and completed in October, and the principal body of information was secured from questions asked of the railway men and their families.[2] But in addition to securing the information called for on the schedule each field worker was instructed to write a case history of each family interviewed and also to prepare at the end of the investigation a statement of the general conditions obtaining in the communities studied. In carrying out this latter instruction the field agents interviewed local union officials, relief workers, and many other representative citizens. A number of points made use of in the subsequent pages were secured in these ways, which could not have been included within the confines of the schedules.

In all, 1,000 railway employees and their families were interviewed. Of these, 980 were from the railways proper and 20[3] were employed in the "water service", in connection with ferries, tugboats, and steam lighters, which in certain localities are an integral part of the railway operations. Fourteen localities were chosen as representative of the major railway districts of the country: Springfield, Mass.; Buffalo, N.Y.; Battle Creek, Mich.; Chicago, Ill.; Minneapolis, Minn.; Spokane, Wash.; Sacramento, Calif.; St. Louis, Mo.; Enid, Okla.; Houston, Tex.; Jacksonville, Fla.; Knoxville, Tenn.; Huntington, W.Va., and Cumberland, Md.; and in each of these localities the families of steam-railway employees were interviewed. To reach the water-service workers visits were made to New York, Philadelphia, Detroit, and San Francisco, the four outstanding cities in which this type of service is maintained by the railroads. In San Francisco and Detroit also a few families of steam-railway men were interviewed in order to complete the quotas for certain occupational groups that could not be filled in Battle Creek and Sacramento.

The first consideration in the selection of families to be interviewed was to obtain as nearly as possible a cross section of the railway employees in each locality visited. All occupational classes represented in the 21 standard railway unions, with the exception of the locomotive engineers, conductors, and longshoremen were covered in each locality, and the quota to be visited from each union group was, roughly, in proportion to the numerical importance of that class among the group of employees as a whole. Each district visited was given equal representation, regardless of the size of its railroad population; but where any particular class of employees could not be located in a district, the quota for that occupation was completed in one of the other districts.

The occupational distribution of the railway employees included in the study was as follows:

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[2] For schedule used in the study and instructions to field workers, see appendix B, p. 46, and appendix, C, p. 47.

[3] These 20 employees are discussed in appndix A, p. 42.

Occupation at date of interview	Railway employees
Total	980
Professional, clerical, and general	170
Chief clerks (minor departments) and assistant chief clerks	13
Clerks and clerical specialists (A)	19
Clerks (B and C)	101
Mechanical-device operators (office)	7
Stenographers and typists (B)	11
Ticket agents and assistant ticket agents	1
Messenger and office boys	3
Traffic and various other agents, inspectors, and investigators	4
Claim agents or investigators	1
Motor-vehicle and motor-car operators	1
Janitors and cleaners	9
Maintenance of way and structures	211
Bridge-and-building gang foremen (skilled labor)	2
Bridge-and-building carpenters	12
Bridge-and-building painters	1
Maintenance of way and structures helpers and apprentices	13
Portable-steam-equipment operators	1
Pumping-equipment operators	5
Gang foremen (extra gang and work-train laborers)	1
Gang foremen (bridge and building, signal, and telegraph laborers)	1
Gang or section foremen	24
Extra gang men	5
Section men	126
Maintenance-of-way laborers (other than track and roadway) and gardeners and farmers	6
Signalmen and signal maintainers	10
Assistant signalmen and assistant signal maintainer	2
Signalmen and signal maintainer helpers	2
Maintenance of equipment and stores	285
Equipment, shop, electrical, material, and supplies inspectors	1
Blacksmiths	15
Boiler makers	17
Carmen (A and B)	13
Carmen (C and D)	36
Electrical workers (A)	12
Electrical workers (B)	8
Machinists	40
Molders	1
Sheet-metal workers	13
Skilled-trades helpers (maintenance of equipment and stores)	54
Helper apprentices (maintenance of equipment and stores)	1
Coach cleaners	11
Gang foremen (shops, engine houses, and power plants)	1
Gang foremen (stores and ice, reclamation, and timber-treating plants)	1
Classified laborers (shops, engine houses, and power plants)	16
General laborers (shops, engine houses, power plants, stores and ice, reclamation, and timber-treating plants)	30
Stationary engineers (steam)	8
Stationary firemen and oilers	6
Coal passers and water tenders, steam plant	1

Occupation at date of interview	Railway employees
Transportation (other than train, engine, and yard)	119
Train dispatchers	13
Station agents (smaller stations—nontelegraphers)	10
Station agents (telegraphers and telephoners)	11
Clerk-telegraphers and clerk-telephoners	3
Telegraphers, telephoners, and towermen	28
Baggage, parcel-room, and station attendants	10
General foremen (freight stations, warehouses, grain elevators, and docks)	1
Gang foremen (freight stations, warehouses, grain elevators, and dock labor)	1
Callers, loaders, scalers, sealers, and perishable-freight inspectors	9
Truckers (stations, warehouses, and platforms)	13
Common laborers (stations, warehouses, platforms, and grain elevators)	4
Parlor-car and sleeping-car conductors	6
Crossing and bridge flagmen and gatemen	10
Transportation (yardmasters, switch tenders, and hostlers)	20
Switch tenders	7
Outside and inside hostlers	9
Outside hostler helpers	4
Transportation (train and engine)	158
Road passenger baggagemen	16
Road passenger brakemen and flagmen	14
Road freight brakemen and flagmen (through)	25
Road freight brakemen and flagmen (local)	15
Yard conductors and yard foremen	9
Brakemen and flagmen—combined duties	7
Yard brakemen and yard helpers	18
Road passenger firemen and helpers	12
Road freight firemen and helpers (through)	22
Road freight firemen and helpers (local)	7
Firemen—combined duties	7
Yard firemen and helpers	6
Express	17
Express messengers—depot	5
Express messengers—train	3
Express clerks (money and value clerks, freight routers, freight callers, rate clerks)	8
Express—vehicular service	1

In spite of the omission of two highly skilled groups an exceedingly wide range of variation in type and skill of workers was represented. Maintenance of equipment and stores employees made up the largest single group, with 29 percent, and maintenance-of-way and structures employees came next with 22 percent. The train-and-engine service, here represented only by flagmen, brakemen, and firemen, constituted 16 percent; the clerical and general forces, 17 percent; transportation workers other than train, engine, and yard, 12 percent; and yardmen and express employees together, only 4 percent.

Only families in which the chief breadwinner was a railroad employee living at home and on the pay roll at some time in April 1933 were included in the group selected. A further requirement was that the chief breadwinner must have at least two persons, children or adults, totally dependent upon him at the time he was interviewed.

In getting in touch with such families the field agents had the assistance of a representative of each of the local unions in each of the localities visited. These representatives furnished lists of employees and explained to the men the purposes of the study. Final selection, however, rested solely with the agents and was not confined to the families recommended by the union representatives nor even to union members. In order to keep the group as representative as possible, an effort was made to include families of the men younger in service, as well as the older ones, and 73 of the 980 railway employees were taken from the "extra board", or list of substitutes. In order to guard against any tendency to include an undue proportion of families in particularly hard circumstances, care was taken to visit a preponderant number of those reported by the union representatives as of average condition. On the whole, it seems reasonably certain that the group selected for study was not overweighted with cases of extreme hardship and that its only significant bias is the one revealed by analysis of the age and service of its members.

BIAS RESULTING FROM AGE AND SERVICE OF GROUP

Sixty-four percent of the chief breadwinners in the 980 railway families interviewed were at least 40 years old, although the total range was from 2[illegible] to 78, and no less than 12 percent were 55 or more. Though some had shifted from road to road, and some had had brief experiences in other types of work, more than three quarters of the group had been for at least 10 years in the continuous service of the railway which was their employer at the time of the study. Moreover, one half of them reported seniority ratings of at least 15 years, and more than a quarter were credited with no less than 20 years of continuous service.[4] Even among the men on the extra board, including waterway employees, 77 percent had been with one road for at least 10 years.

This unusual age distribution, with its preponderance of older workers, has its origin in the system of seniority rights, a labor policy that was brought about by agreements between the labor unions and the railroad managements and that is in many respects peculiar to the railroad industry. Prior to the time the railroads were taken over by the United States Railroad Administration the principle of seniority rights was in operation on only a few railroads and applied to only a few union groups that had working agreements with the railroads, but since that time it has been extended to all railroads and to practically all classes of employees. By this system preference in promotion, desirable assignments, and avoidance of layoffs in general depends on the order of years of service. In the case

[4] This general situation finds specific illustration in the reports of union officials in one eastern city, regarding the seniority range of the employed members of their locals at the time of the study. Several railroads are represented. It will be noted that only one group reported the employment of any men with less than a 10-year rating.

Railway employees	*Seniority range, years*
Firemen and enginemen	17–22
Brakemen and flagmen	17–35
Telegraphers and towermen	15–42
Dispatchers	16–26
Clerks in freight office	9–44
Laborers in freight shed	11–21
Clerks in car-service department	11–42
Signalmen and towermen	11–34

of skilled workmen the operation of the principle is subject to their passing of certain tests for promotion, and in every case it is applied only within strictly defined occupational groupings on a particular part of a given railroad. Thus in the train service the engineers and firemen on a given division of a given railroad belong to the same seniority roster, with individuals passing from one occupation to the other, and there is similar interchange between conductors and brakemen. A brakeman, however, does not become an engineer nor a fireman a conductor. More typically the classifications are limited to members of a single union and occasionally to still smaller occupational groupings.

For this study the significant aspect of the seniority system is its effect in a time of retrenchment and lay-offs. The immediate explanation of the nature of the present age distribution lies in the practice of what is known as "bumping" or "knocking" or "rolling", by which a senior employee whose own position is abolished may displace any man junior to him. Here, too, the limitations described above operate. A locomotive engineer may "bump" a fireman; he cannot, however, displace a brakeman because the position comes under a different agreement. As a result certain groups have suffered greater unemployment than others.

From these facts the study derives an unintended and a most significant bias. Any group of workers who still held jobs in 1933 was a selected one, and on the railroads the policy of seniority preference determined that the selection should be of men relatively old in years and service. The importance of this is obvious. These were men who were in many ways better prepared than other employees to meet the emergency of the depression. They had in the past held the better jobs on their respective rosters and had been least subject to unemployment and to partial employment. They were the ones who were most likely to have finished payments on their houses and to have paid-up insurance policies or other savings, and they were the ones whose children were most likely to have grown up and become independent. Even where the latter had had to come back to their parents for help, there was at least the chance that they might find odd jobs. Nor does a diet of bread and beans have such serious and immediate consequences for the physically mature. In the not distant future, to be sure, this same factor of age will render these men more rather than less vulnerable to hardships; but for the present—and for everything that a current investigation could reveal—it tended to give them a relatively superior position. For this reason, therefore, a number of agents wrote back from the field that the basis of selection understated the degree of hardship among railroad employees. Those who planned the study were scrupulous in insisting that the cases chosen should be thoroughly representative, but the practices of the railroad industry made it inevitable that any sampling of those employed during the depression would come from a comparatively favored group.

CAUSES OF REDUCED EARNINGS OF RAILWAY EMPLOYEES

On February 1, 1932, by formal agreement between the railroad managements and the standard labor organizations, a general 10-percent deduction was made from the wages of all railway employees. This agreement was to run for 1 year, but it has been twice extended—on December 21, 1932, and on June 21, 1933—and is still in force at the present time.[a] This cut, however, is only one of many factors that have combined to reduce the income of railway workers since the beginning of the depression. Indeed, a comparison of earnings between July 1929 and April 1933 shows conclusively that it has not even played the major role. Two-thirds of the workers whose earnings in the two periods could be ascertained reported a decrease of at least 20 percent, and 50 percent reported a loss of 30 percent or more. Since the general wage cut received wide publicity and since the facts of underemployment and "bumping" have been little known, it is necessary to give particular emphasis to the effect of the latter two factors as causes of the reduction in earnings.

Short time, usually a 5-, 4-, or 3-day week, but occasionally a shorter day, was the most general type of underemployment. In many cases this was the first loss suffered, and a number of men, for example, worked 6 days a week in 1929, but only 4 a week after November 1931, which meant a cut of 33 percent.

Almost as prevalent was irregular employment—a day off here, a week or two off there. The "budget" system, used particularly with the maintenance-of-way men and occasionally with other groups as well, also caused much loss of time. Under this plan, when the budget allowance of "man-hours" or "man-days" is used up before the end of the month, lay-offs occur until the beginning of the next month. The following report for a maintenance-of-way man in one of the eastern cities visited is typical of many. In his department no furloughs had been imposed, but in avoiding these the work had been spread until the men at times had no more than 10 days of work per month. Up to December 1930 a 6-day week had been in effect; from December 1930 to March 1931, a 5-day week; from March 1931 to August 1932, a 4-day week; and from August 1932 to January 1933, a 3-day week. In January and February 1933 only 10 days of work had been given each month; from March to August (the month of the interview) the working week was 8 days.

To what extent short time and irregular employment were responsible for decreases in earnings may be seen in table 1, which shows days lost for industrial reasons in April 1933 as compared with full-time hours in 1929. It will be noted that in April 1933 nearly two-thirds had lost some time—50 percent at least 5 days and 25 percent at least 10.[b]

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[a] By agreement between the railroad managements and the standard labor organizations the 10-percent wage deduction is to be restored in instalments—2½ percent July 1, 1934; 2½ percent Jan. 1, 1935; and the balance (5 percent) Apr. 1, 1935.

[b] These percentages do not include workers on a mileage basis nor those present in this group only in April 1933.

Shopmen have been further deprived of working time by periodic shutdowns. There are communities in which shops were closed for more than a year and the men furloughed. The men engaged in the train-and-engine service have accepted lower mileage allowances, which mean lay-offs of a day or two at the beginning of the month because the preceding month's allowance has been exceeded.

TABLE 1.—*Days lost for industrial reasons—reduction in number of days employed in April 1933 from number of days employed in full-time month in 1929* [1]

Reduction in days employed	Railway employees	
	Number	Percent distribution
Total	980	
Total reporting working time	841	100
No reduction	318	38
Less than 5 days	80	10
5 days, less than 10	250	30
10 days, less than 15	101	12
15 days, less than 20	66	8
20 days, less than 25	19	2
25 days, less than 30	7	1
Not reporting working time	10	
Employed on mileage basis	120	

[1] Obtained by subtracting the number of days worked in April 1933 from the number of days worked in a full-time month in 1929.

The loss of overtime has also been responsible for some decrease in earnings. Furloughs, often of several months' duration, were a much more important cause of lowered annual earnings.

Demotions due to displacement by men with higher seniority ratings, though not affecting so many men as underemployment, were nevertheless a most significant source of radical wage cuts and of occupational maladjustment. A little more than one-third of the railroad employees included in this study reported that they had been obliged to accept at least one such demotion within the last 4 years. Resulting decreases in basic rates of pay were as high as 50 percent, and decreases of as much as 20 percent, 25 percent, and 30 percent were common. Some men whose basic rates at the time of the study were no less than in 1929 had been shifted back and forth between lower- and higher-paid jobs so that their earnings had been considerably reduced in intervening periods.

Since a lower assignment sometimes means not one step down, but several, the situation was even more serious than these figures indicate. For example, several skilled shopmen were found employed as car cleaners; a chief clerk was working as a messenger; and an engineer was reduced to the position of hostler. In one western city, where in normal times only Mexicans will work on the section gangs because of the intense heat, it was reported that about 10 percent of the men "along the line" now were "white men" who had been "bumped" from higher positions.

Although demotions to lower-paid positions occurred to some extent in all the occupational groups included in the study, the train-service men were especially affected. Many more jobs have

been abolished in this group because they have been subject to the effects both of reduced railroad services and of the recent technological changes in the railroad industry—particularly the use of heavier engines which facilitate the use of longer trains, thus reducing the number of crews. An official of the Brotherhood of Locomotive Firemen and Enginemen stated that on the seniority list of his local there were 320 men with seniority as engineers, 295 of whom at the time of this study were employed as firemen. Of the 180 men on the firemen's seniority list, none was employed at that time and none had been for 2 years past. Many conductors are now acting as brakemen, the position just below on the seniority list but involving quite different duties. In 1 city 25 of the 78 men that were in service in 1929 on 1 railroad had been furloughed; all of them were conductors who had been demoted to brakemen and then laid off. Whereas of the entire group included in the study, 34 percent had had at least one demotion since 1929, for the trainmen and firemen this figure was 68 percent.

The following cases show the extent to which demotion lessened the earnings of some railway workers:

Mr. T has seniority rating of 9 years. Until June 1931 he held the position of mail handler, which carried a wage of $4.48 a day. On that date, because of a consolidation of jobs superior to his, he was demoted to the position of janitor at a wage of $3.09 a day. His monthly earnings were $80 as compared with $116 on his former job, a decrease of 22 percent. In March 1933 he again suffered a demotion to the extra board. His rate of pay remained the same, but he seldom had work enough to average more than $37 a month. He remained on the extra board until August 1933 when he was returned to the regular service, where his earnings again averaged $80 per month.

Mr. X was a class-A clerk in July 1929. His base rate of pay was $4.57 per day, and he worked 7 days a week. In 1931 he was "rolled" by a man with higher seniority rating to the position of messenger, which, with a 7-day week carried the wage of $45 per month. On his former job his monthly earnings amounted to $147.10.

Before the depression Mr. C was a car inspector earning 73 cents an hour; he had held this job for 9 years. In April 1931 he was demoted to carman; on this job pay was on a piecework basis; he averaged between $120 and $125 a month. One year later, April 1932, he was furloughed and was without work until November 1932, when he was taken on as extra section man. His wage varied from 37 cents to 41 cents an hour, depending upon the type of work. Under the rules of the railroad on which Mr. C works, a carman loses his seniority after a year out of service. Consequently, though he has seen 10 years of service with the road as carman and car inspector, he now has only 9 months' seniority as section man.

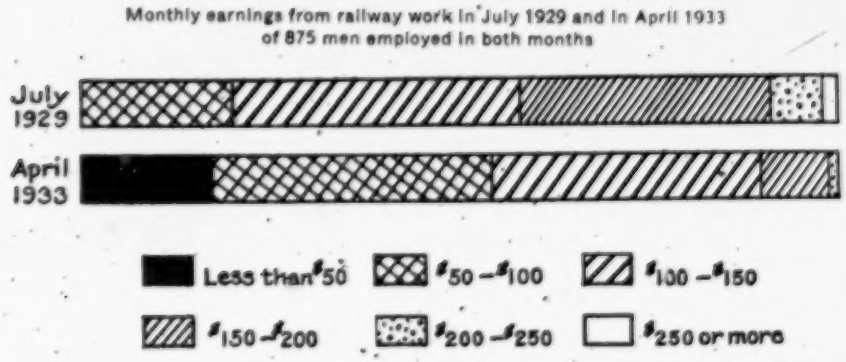
There are a few other causes of decreases in earnings which must be taken into account. Station agents have suffered a loss of express commissions as business has fallen off. Car cleaners on one railroad were deprived of a bonus that they had formerly received. Certain pieceworkers stated that their earnings have been reduced by a change to a daily rate of pay. None of these factors, however, can compare in the extent or intensity of their effect with involuntary losses of working time and "bumping."

EARNINGS AND INCOME OF GROUP STUDIED

EARNINGS OF CHIEF BREADWINNER

Earnings from railway work

As a result of the various decreases described, the earnings in 1932 of the 980 men studied were startlingly low. Thirty-eight percent had made less than $1,000 and two-thirds, less than $1,500. One hundred and two men earned as little as $500, and only 18 percent as much as $1,750. So low were earnings in general that men on the extra board sometimes received as much as men in the regular service. Of the former, one-half had earned no more than $1,000, and a little more than a fifth, as little as $500 (table 2). Some indication



of the fall in wages may be obtained by utilizing for purposes of comparison a study of the maintenance-of-way men made by the United States Children's Bureau in 1928–29.[6] This group, because their work is largely unskilled and seasonal, are among the lowest-paid railway workers. Nevertheless, the earnings of slightly more than one-fourth (29 percent) of the employees covered by the present study, among them highly skilled and normally much better paid employees, amounted in 1932 to less than the median earnings ($846) of the maintenance-of-way men in 1928–29.

Study of the reports published by the Interstate Commerce Commission confirms these findings. According to these figures there was a decrease in average yearly earnings between 1929 and 1933 for the groups such as those covered by this study, ranging from 9 percent for the general and clerical workers to 26 percent for the maintenance of equipment and stores employees.[7] The decrease for employees in general was 17 percent.

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[6] Welfare of Children of Maintenance-of-Way Employees. U.S. Children's Bureau Publication No. 211. Washington, 1932.
[7] See footnote, p. 3.

TABLE 2.—*Occupation and earnings in 1932 of railway employees included in the study*

Occupation in 1932	Railway employees									
	Total	Earnings from railway work in 1932								
		Less than $500	$500, less than $750	$750, less than $1,000	$1,000, less than $1,250	$1,250, less than $1,500	$1,500, less than $1,750	$1,750, less than $2,000	$2,000, less than $3,000	Not reported
Total	980	102	120	148	127	149	152	96	78	8
Professional, clerical, and general	171	2	2	11	27	42	49	24	13	1
Maintenance of way and structures	211	62	49	40	15	24	15	5	1	...
Maintenance of equipment and stores	286	22	55	69	61	36	22	13	2	6
Transportation (other than train, engine, and yard)	116	6	7	14	14	21	19	14	20	1
Transportation (yardmasters, switch-tenders, and hostlers)	21	...	...	1	...	5	11	3	1	...
Transportation (train and engine)	159	10	5	12	9	17	28	37	41	...
Express	16	...	2	1	1	4	8	...	...	...

These figures are significant, but they do not tell the whole story. Although they show the drop in earnings within the occupational group they fail to show the losses of demoted employees. A man who was employed as a locomotive engineer in 1929 at a wage of $7.99 a day and is now a hostler at $6.27 a day has suffered a much greater reduction in earnings than the man who was a hostler in 1929 and is one now.

On the basis of monthly earnings it is possible to take such factors into account and thus to obtain a more complete picture. For each of the railway employees visited information was secured as to the number of days employed in April 1933 (the last full month prior to this study), the earnings in that month, and the basic rate of pay.[8] Similar information was obtained for the month of July 1929, which was selected because it antedated the 10-percent cut and the curtailment of railroad service. In April 1933, 53 percent of the 977 workers reporting had received less than $100, and only 125 as much as $150. Table 3 and the graph on page 12 show the wide difference between the earnings in this month and in July 1929. Of the 868 employees for whom this comparison could be made, fully 75 percent reported a decrease in excess of 10 percent, and 43 percent a decrease of 20 to 50 percent.[9] A few, it is true, received higher assignments and consequently no reduction in earnings, but these fortunate ones were only 5 percent of the group. Even these monthly figures, although they disclose large enough losses, underestimate the differences, for no account was taken of the remuneration for overtime in July 1929 except when such work was a regular part of the job.

[8] This method of computation takes care of changes in earnings brought about through demotion.

[9] The men in the train-and-engine service were not included in this comparison because their railroad earnings for 1929 could not be estimated. This group of employees are paid on the mileage basis, but even when the mileage record is known there is no way of determining their earnings (except from pay rolls, which were not available) because the rate of pay varies with the branch of service and with the type of engine used.

TABLE 3.—*Occupation in 1929 and percentage decrease in earnings in April 1933 as compared with July 1929 among railway employees included in the study*

Occupation in 1929	Railway employees											
	Total	Decrease in earnings from railway work in April 1933 as compared with July 1929										
		No decrease	Less than 10 percent	10 percent even	More than 10 percent, less than 20	20 percent, less than 30	30 percent, less than 40	40 percent, less than 50	50 percent, less than 60	60 percent, less than 70	70 percent or more	Not reported
Total	980	16	31	174	65	151	109	132	82	59	49	113
Executives, officials, and staff assistants	1							1				
Professional, clerical, and general	180	8	8	52	25	37	19	6	3	5	8	9
Maintenance of way and structures	204	2	3	38	9	34	19	32	42	16	7	2
Maintenance of equipment and stores	282	3	6	31	9	40	51	70	25	27	15	5
Transportation (other than train, engine, and yard)	108	3	5	35	11	12	3	7	4	2	11	15
Transportation (yardmasters, switch tenders, and hostlers)	18			7	1	7		1	1		1	
Transportation (train and engine)	160		5	7	7	20	16	14	6	8	6	71
Express	17		4	4	3	1	1	1	1	1	1	
Not employed in railway work in July 1929	10											10

Other earnings

With a majority of the railroad workers studied making less than $100 a month, they had a very strong incentive to supplement their income by outside work; yet only 60 of the 980 succeeded in doing so. Even among these cases, moreover, the man with a well-established printing shop and the one who had successfully launched an auto-repairing establishment were decidedly exceptional; and most of the work found was in the nature of odd jobs. This is clearly brought out by the figures on outside earnings. Fifteen men did earn $300 or more from these sources during the year, but less than half earned as much as $100, and a third earned less than $50. Yet these small sums must often have been welcome additions to the family income; the $10 earned from odd jobs was not to be despised by the brakeman on the extra board whose $460 had to provide for a wife and three children.

ADDITIONAL SOURCES OF INCOME

Earnings of others in family

When the chief breadwinner's earnings are as low as were many of those here recorded, the question of other sources of family income becomes an important one. Yet these other sources—earnings of others in the family, receipts from boarders and lodgers, income from property and investments, and so forth—contributed comparatively little to family incomes. In 59 percent of the families visited the earnings of the chief breadwinner, and in 55 percent his earnings from the railroad alone, were the only source of income in 1932. Furthermore, among the 402 families in which income from other sources was reported, in at least 175 (44 percent) such income consti-

tuted less than 20 percent of the total income for that year.[10] The most important single supplement of the earnings of the chief breadwinner was the earnings of other members of the household, which existed in 261 of the 402 families.

In the 980 families studied there were 431 persons other than the chief breadwinner who ordinarily were employed. Of these 431, however, only 218 were employed at the time of the visit. In many families, too, there were boys and girls between 16 and 20 years who had left school during the depression and had been unable to find work.

In the majority of the families in which there were wage earners other than the chief breadwinner, it was sons and daughters who shared the support; in 71, however, the wife contributed, and in some instances other relatives. Although the majority of the sons and daughters who were employed were over 20 years of age, their work was largely irregular with the jobs few and far between. In nearly half of the families their earnings amounted to less than $300 for 1932 and in one-fourth to less than $100.

Of the wives who shared the burden of family income, 51 (almost three-fourths) were working away from home and, whatever other advantages they may have gained from such work, they were unable to carry out those ingenious economies which housewives achieve. Only 12 women, moreover, earned more than $300 during the entire year and 41 (more than 50 percent) earned less than $100.

Income from boarders and lodgers

The care of boarders and lodgers also rested on the wives' shoulders. The number of families who supplemented their income in this way was small—only 50 families, and three-fourths of them had resorted to this only with the advent of the depression.

Income from property

Income from property in the form of rent was the second most common source of supplementary income. Ninety-one of the 980 families covered by the study reported some receipts from rent, usually from apartments and houses, but occasionally from farms and business buildings. These amounts for the year varied from less than $50 to $2,200. In every instance, however, the sum reported represented the total payment received. Naturally, there were considerable deductions for taxes, interest, and repairs. As other property owners will realize, the property held by many families became, instead of an asset, a liability. For example, Mr. P depended on the rent he received from the upper story of his house to meet his annual tax and mortgage payments. The former amounted to $127 in 1932, and the latter averaged $200 yearly. Until 2 years ago when, in order to keep his tenant, he reduced his rent $15, he received $35 a month for the flat. A year ago the tenant lost his job, and he has paid no rent since. In order to meet the interest on the mortgage and the taxes this past year Mr. P had to borrow from friends.

[10] In 135 families it was impossible to compute the proportion of total income represented by supplementary income since in these cases such income was from property rents and from boarders and lodgers and did not necessarily represent a profit.

Other sources of income

Other sources of income were returns from investments (particularly insurance), Government compensation and insurance, gifts of money from sons and daughters away from home, payment from accident and sickness insurance, bequests or inheritances, and sale of property. Seventeen families reported income from investments, 16 had received money gifts, and 16 had drawn compensation or insurance from the Government. Not more than 10 families reported income from any other sources.

The year 1932, which saw dwindling earnings for chief breadwinners, brought also greatly reduced family incomes. What was in the largest number of cases the only important addition to the family income, the salary of one or more additional wage earners, had been drastically reduced. Rents had declined, and banks had failed. But those very few families who obtained fairly large sums from investments and inheritances remained comfortable.

TOTAL INCOME

For the families included in the study the total income for the year 1932 was not much greater than the income of the chief breadwinners. In more than half the families, 58 percent, the income as calculated was less than $1,500; in practically three-fourths it was less than $1,750. Nor would these sums be substantially higher even if an allowance had been made for receipts from boarders and lodgers and from rents, since property ownership was often a current liability.

The larger incomes were not necessarily reported by the larger families. Of 292 families with 6 members or more, 36 percent had an income of less than $1,000, and only 27 percent, of more than $1,750. On the other hand, among the families with no more than 4 members, only 29 percent reported incomes of less than $1,000, while 25 percent had cash receipts of $1,750 or more (table 4).

TABLE 4.—*Household income[1] during 1932 and number in household[2] dependent on this income; railway employees included in the study*

Number in household dependent on household income[2]	Railway employees											
		Household income during 1932[1]										
	Total	Less than $500	$500, less than $750	$750, less than $1,000	$1,000, less than $1,250	$1,250, less than $1,500	$1,500, less than $1,750	$1,750, less than $2,000	$2,000, less than $2,500	$2,500, less than $3,000	$3,000 or more	Not reported
Total	980	78	103	123	127	130	141	113	99	26	9	30
2	2			1			1					
3	220	25	27	25	25	37	36	23	18	2	1	1
4	251	16	18	25	41	36	40	30	32	9	2	4
5	204	18	25	26	23	32	29	21	20	8	1	4
6	115	10	14	20	10	17	13	14	11	1		5
7	80	8	15	8	13	7	8	12	7	3	1	4
8	38	1	1	8	7	8	8	8	5	1		3
9 or more	70	6	7	10	8	8	12	10	6	2	4	

[1] Exclusive of income from rents and boarders and lodgers.
[2] Exclusive of boarders and lodgers.

REDUCTION IN COMMUNITY SERVICES

It is, moreover, important to remember that greatly thinned purses had to stretch farther in order to accommodate unemployed friends and relatives. As a later section will show, that familiar depression practice, the doubling up of families, was common among railway workers. Furthermore, at this time, when individual earnings were decreasing and individual obligations increasing, appropriations for community services failed to keep pace with increased community needs. As is well known, many communities, suffering from decreased revenues, have reduced their expenditures for these purposes; the phenomenon of contracted budgets is widespread.

Even in prosperous times towns and villages have little to offer in the way of social services; these are the boasts of large cities. At the time of the study, however, only a very few cities were attempting to extend these programs. Some of the largest cities, with crowded industrial populations, were making the heaviest retrenchments in educational, clinical, and hospital facilities. School programs were drastically curtailed, public libraries were closed, and clinical and hospital facilities were restricted to "indigents." In other cities, although no actual curtailment took place, failure to meet the increased demand had the same effect.

The following brief accounts are reports of the effect on social services in some of the communities visited:

A large city in the Northwest was operating its public-school system on a budget $1,000,000 short of last year's, with an increased enrollment of 1,000. The school term had been shortened, and a reduction made in the school staff. Activities of the child-guidance clinic had been curtailed. The music, art, and science departments had suffered through the transfer of subject supervisors to teaching positions in the schools. Further curtailments were necessary in order to meet the budget, and the board was considering such means of economy as further shortening the school term to 7 months, shortening the school day, and closing some of the elementary schools.

In a large eastern city the annual report of the librarian for 1931–32 reads: "A careful compilation shows that there would have been an increase of over one-half million circulation, except for the closing of four branch libraries." In this city the father of three boys reported that his sons had read on an average of three books a week since they had been unemployed, but that they would have to do without if they should need car fare to get them; other families had complained because the branch libraries near their homes had been closed and they did not have car fare with which to get to the main library. No serious curtailments had been made in the school program in this city, but neither was it being extended to take care of the enormous increase in the enrollments of continuation-school classes. Playgrounds were conspicuous by their absence. Most of the children played in the streets, some played along the tracks, and every vacant lot had its gang of boys and young men—16 to 25 years old—playing cards or baseball at all hours of the day. Whether or not they would have attended school if given the opportunity is unknown, but many of them, when asked, expressed a desire to go on with their education. Only indigent families were able to obtain free medical treatment at clinics and hospitals. A few of the families interviewed had applied and had been refused. This was due not to curtailments but to the increased demand for this service. Hospitals and clinics were crowded daily with persons waiting to receive atten-

tion. It was impossible even to care for emergency cases properly. One father interviewed had waited from 9 a.m. to 2 p.m. with a child who had broken his arm and then had left without receiving attention.

A large midwestern city had made every effort to maintain its high standard of public service. The school program had been curtailed, but not so seriously as in some other cities of the same size. Fewer teachers had been hired, although the number of pupils had increased; the postgraduate courses formerly offered had been abandoned, and the night-school program had been greatly reduced. No curtailments had been made in library services, and none in clinical and hospital facilities. No effort has been made, however, to increase hospital and clinical service to meet the demand. An extensive athletic program, municipal opera, playgrounds, and other recreational activities were being conducted as usual; and a new municipal auditorium, well on the way to completion, was expected to offer new and greater advantages to the public.

Until July 1933 residents in a far western city who were unable to pay in full for medical service and hospitalization at the county hospital could obtain it at half the usual rates, and bills were not rendered if the family was unable to pay at all. A large percentage of the children of shopmen and maintenance-of-way men were born there. Since July, however, this service has been available to indigents only. Even a family in which the only wage earner is working 1 day a week is denied medical attention. The explanation offered for the change was that it would reduce the tax rate. There had been no curtailment in school services in this city, nor in educational facilities generally. There were no supervised playgrounds, but the need for playgrounds in this city is not pressing.

In a small southern city all libraries were closed during the month of August 1933 in order to curtail expenditures. Public-school facilities here were of a high standard, and no curtailments to speak of had been made in the school program. Playground and recreational facilities were limited, especially in the districts where most of the railway men lived. There were a few playgrounds—mostly school grounds used as such—very unattractive and with very little equipment.

INCREASED OBLIGATIONS OF FAMILIES

This period brought with it not only materially reduced family incomes but also greatly increased family obligations. Unemployed workers in 170 families had to be cared for from the lowered earnings of the chief breadwinner. Boys and girls out of school, who in the normal course of events would have been earning money, were still dependent on their parents for support. Furthermore, relatives and friends deprived of their jobs and often of their savings because of the depression had to be assisted, although such assistance involved sacrifice of comforts and necessities.

Thirty-eight percent of the families visited reported that they had contributed cash or groceries to relatives and friends in 1932. In a little more than one-third of these families the amount contributed could not be computed because the aid was given in the form of groceries.[11] Among the 221 families in which amounts paid out could be estimated, 98 reported expenditures of this type of less than $50; 54, amounts between $50 and $100; and 69, amounts from $100 to $500.

Assistance given friends and relatives who were taken into the home entailed greater inconvenience and sacrifice. Men who had been supporting families of three and four suddenly found themselves the chief breadwinners for seven and eight. Sometimes the additions to the household were married sons and daughters who had returned with their children to the families of their parents. Often it was the parents who were obliged to seek food and shelter for themselves and their younger children in the homes of their married sons or daughters. Brothers and sisters, too, had to be provided for. This meant the scattering of families, one to one relative, 1 to another, and also the doubling up of families, with 2 and even 3 families dependent on the earnings of a single worker. The contents of slimmer pay envelopes had to be spread further; small apartments had to expand miraculously. Social adjustments also were necessary; people who perhaps had never been overly fond of each other found themselves at the same table.

A little more than one-fifth of the families visited reported that they had relatives and a few that they had friends living with them at the time of the study, wholly or partially dependent on them for food, clothing, and shelter. In addition, other families stated that they had assisted relatives in this way at various periods within the past 3 years. Some families had carried the burden of support of relatives for a few months, many since the beginning of the depression.

What the support of relatives has meant to some families may be seen from the following cases:

[11] Frequently the contributions were made in the form of groceries because the family lacked cash but could still obtain goods and services on credit.

A carman and his wife with an income of only $1,200 in 1932 had had to stretch this meager sum to care for a married daughter and her son who were entirely dependent upon them and to help another daughter and her husband who "had a little", but not enough to keep them. The first daughter and her son had lived with the parents for more than a year, and the second daughter and her husband took their meals there whenever the husband was unemployed. In 1932 they had "eaten there about half the time." In order to make ends meet and care for everybody all luxuries had been eliminated, their car had been sold, and the father had borrowed $200 on his insurance. In addition he owed $29 to the family physician for care when the grandson fractured his arm. In order not to incur any debts that could possibly be avoided, the family had made it a rule to buy food only when they had the money in hand to pay for it. Both the father and mother were in need of dental attention, but that had to wait until they had fewer dependents to support.

A section hand, 29 years old, with an income of approximately $408 in 1932, was the sole support of a family of five adults at the time of the study. His father, also a section hand, had been furloughed 1 year previous. Two brothers, 18 and 21 years, had had no work since leaving school, and a sister, 22 years old, who had worked at a silk mill at a wage of $13 a week, had been laid off 3 weeks previous to the interview. In addition to carrying this family the son had helped with groceries and small sums of cash, a sister with two small children and an unemployed husband. In order to share with these unemployed people, all possible expenditures had been eliminated. No debts had been contracted because the family "have done without rather than make debts", but an insurance policy had been sacrificed to meet current expenses.

A stationary engineer with a wife and one child had taken into his home early in 1932 two married daughters, their husbands, and two grandchildren, aged 3 and 5 years. The father's earnings were only $157 a month, and in order to take care of the additional members of his household he had placed a mortgage of $200 on his house and had run a bill of $60 at the grocer's. Both sons-in-law were still out of work when visited, but they had prospects of work and hoped to be self-supporting in the near future.

EFFECT OF REDUCED INCOME ON STANDARD OF LIVING

If both individual and social income were so sharply cut, and if obligations were so often increased, how then did these railway men's families manage to meet the emergency of the depression? The question is less definite and more difficult than that of the amount of earnings, but the facts recorded in the case histories give considerable concreteness to the answer. No doubt the families represented in the study were aided by the substantial drop in the cost of living between 1929 and the spring of 1933 but no one who reads the detailed histories could believe that this factor had been sufficient to offset the losses in earnings. Virtually every case shows evidence either of capital loss or of painful economies in current consumption or of both. To these losses and to these expedients the present section is devoted.

CAPITAL LOSSES.

The hardships incurred because of a depression do not all end when the depression does. Savings acquired through long effort and exhausted in this time can never be regained; homes sacrificed of necessity will not return to their owners; insurance and investments converted into cash to meet current bills may never be replaced. Moreover, those families whose incomes at best afford a very modest living must pay out of their limited means debts incurred in the past 4 years.

Loss of homes

People with steady incomes and a reasonable amount of economic security are likely to take thought for the future and to further their future well-being even at the expense of the present. The railway men have been such a group. A relatively large proportion (53 percent) owned or were buying their homes in 1929. Of these, 370 were still making payments at the time of the study. In many families the taxes and interest charges were being met in a spirit of "do or die", for when men have grown older, as many of those visited had, they feel strongly the need for a "house over their heads" before "anything happens to their earning power." As one man explained, "If we see that we are not going to have enough [to meet taxes, interest, and mortgage payments], we cut out other things. We can eat bread and coffee if necessary."

In spite of their almost desperate clinging to their homes, 44 of these 370 families lost their homes through foreclosure or forfeiture in the period between 1929 and 1933. Of these only 6 had realized any cash in the transaction, while 38 lost all their investment, which was in many cases considerable. Many other families, knowing that no amount of economy would enable them to meet their next interest payment, not to speak of the amortization charge, lived in constant

fear of foreclosure. In a number of instances efforts to refinance the mortgage through the Home Owners' Loan Corporation had failed.

Loss of savings

Undoubtedly many families had applied all that they could save above current expenses to payment on their homes. Nevertheless, half of the 848 families reporting had some cash reserves at the beginning of the depression. At the time of the study only 31 families had their savings intact, and only 128, less than one third, had retained even a part of them. In 55 families the entire amount had been lost in bank failures, but in 272 all such savings, and in 79 part of them, had been expended either to provide daily necessities or, less frequently, to meet special obligations such as taxes. If it is realized that these savings were frequently accumulated against the infirmities of a now rapidly approaching old age and frequently represented Spartan living, something of the gravity of this situation will be understood.

Insurance losses

The cashing in of insurance was a last resort, the final way of raising needed cash before debts were incurred. In 464 families, 47 percent of those included in the study, some insurance had been dropped in this way. Often insurance of one or more members of the family was relinquished in order to make possible the continued payment of the policy of the chief breadwinner, for it was felt that the economic security of the family depended on this. However, at the time of the study one third of the 939 chief breadwinners who had had insurance in 1929 had dropped or cashed in at least a part of their policies (table 5). For the most part the insurance cashed in was completely relinquished even though it had sometimes been carried for as long as 15 or 20 years; in some instances, however, the insurance had been converted into a cheaper type or a smaller amount. Frequently the insurance had been used as security for loans until it had no value. In other cases, particularly in the case of group insurance with railroads, the holder dropped his policy because he was no longer able to pay the premiums.

One of the most serious consequences of this sacrifice of the life insurance of the chief breadwinner is that so many men have reached the age when the cost of new insurance will probably be prohibitive even when industrial conditions and earnings improve. Sixty-four percent of those who have dropped at least part of their insurance are 40 years of age or more.

The home of a boilermaker. This house was bought before the depression. The family has managed to keep up the payments, but the effort to do so has forced the mother to find employment and has caused drastic lowering of the family's standard of living.

The home of a former pattermaker's helper, now a section laborer. This family has lost one house since 1929 and is now on the verge of losing this one.

TABLE 5.—*Amount of life insurance carried by railway employees in July 1929 and number of employees that had dropped or cashed in insurance since that time*

Amount of life insurance in July 1929	Railway employees			
	Total	That dropped or cashed in insurance	That did not drop nor cash in insurance	That did not report whether or not they dropped or cashed in insurance
Total	980	295	642	43
None	41		41	
Less than $500	38	10	26	2
$500, less than $1,000	69	17	51	1
$1,000, less than $1,500	143	34	103	6
$1,500, less than $2,000	111	36	72	3
$2,000, less than $3,000	212	68	134	10
$3,000, less than $4,000	155	43	110	2
$4,000, less than $5,000	63	22	35	6
$5,000 or more	130	50	63	8
Not reported	18	6	7	5

In many families not only life insurance but accident insurance also had to be dropped. Three hundred and twenty-five of the railway employees visited reported that they had carried accident insurance in 1929, the payment to be made in case of death varying from $60 to $40,000. Since railroad earnings had been greatly reduced, 74 had been obliged to give up this provision for their dependents.

DEBTS INCURRED

Although, as indicated, every effort was being made to stave off debt, 74 percent of the families visited stated that they had outstanding debts or obligations, incurred only since the beginning of the depression. These debts were not only a strain on the meager resources of the chief breadwinner but also a source of worry and fear, since in normal times garnishment proceedings usually mean discharge for a railroad worker.

Arrears in payments on mortgages and taxes

Four hundred and seventy-eight of the 980 families interviewed owned their own homes at the time of the study. Of these 370 were still paying on their property or were paying a mortgage placed on it in order to raise some cash. Thirty-nine percent were in arrears with their payments on either interest or principal, and in 64 cases on both. In a number of instances no payments had been made on the principal for 2 years, and often interest payments were a year overdue. The same condition existed in the matter of taxes. One-fourth of the property owners were in arrears; and although the majority owed taxes for 1 year only, 40 had been unable to pay them for 2 years and a few for 3 years.

Money borrowed

It is well known that when a worker borrows money he usually pays ridiculously high rates of interest. Lacking experience in these matters, owning no securities, ashamed of his plight, he is often at

the mercy of the first loan shark whom he encounters. Nor does he have far to seek, for these plaster his doorstep with attractive and highly imaginative handbills. Among the railroad families this advertising was so successful that some borrowed in order to pay bills which ordinarily carry no interest charges, such as grocery bills and doctors' bills. It is not necessary to describe how deduction of interest before the loan is made, weekly or monthly installments in paying, penalties for failure to meet payments, and so forth, can bring the cost of a loan to 40 percent of its face value. The following case of a section man whose employment during the depression was extremely irregular will illustrate the point. In the latter part of 1929 he borrowed $10 at the rate of $2 a month. In 1931 he borrowed $15 from another company and agreed to pay $3 a month interest. In 1932 he obtained a third loan of $15, the interest charge being $6 a month. When interviewed in 1933 he had just taken a fourth loan of $30 with semimonthly interest charges of $4.50.

Fortunately, not all the 135 families who borrowed from loan companies were so outrageously treated. Most of them paid at the rate of 3½ percent a month (on the whole loan), although the range was from 8 percent a year to 10 percent a month. The interest charged by the other sources, such as banks, credit unions, and insurance companies very rarely exceeded 12 percent a year. One hundred and sixty-six families had borrowed from friends or relatives. Slightly more than one-half of the families had had recourse to one of these methods to obtain needed funds at one time or another since 1929.

Current bills

In addition to the obligations mentioned, 583 families—59 percent of the total—reported unpaid bills, owed to landlords, retail merchants, physicians, dentists, hospitals, and so forth. Frequently these were in addition to money owed on property and debts incurred through borrowing. A little more than half of these families owed $100 or more, and of these 91 owed between $250 and $500, and 33 owed $500 or more.

The following list shows the type of debts owed and the number of families involved in each case. There is a certain amount of overlapping. It is interesting to note that by far the largest single item is for medical care.[19]

Outstanding debts contracted since 1929	*Number of families*
Physicians, druggists	414
Furniture	169
Butchers and grocers	162
Landlords	74
Clothing	50
Fuel	40
Hospitals	39
Merchandise	38
Gas and electricity	16
Property repairs	15
Tradesmen	15
Funeral expenses	12
Automobile dealers	9
Insurance	6
Lodges and organizations	6
Union dues	5
Attorneys	5
Books	3
Other	36
Type not reported	2

In many cases creditors had shown a depression-time leniency in pressing their claims, but no less than 32 of the families had been subjected to garnishment proceedings, and 6 others reported threats

[19] Money owed on installment purchases not in arrears has not been considered a debt.

not yet carried out. One man had gone through the experience twice during the depression, and in another family the chief breadwinner had gone into bankruptcy to avoid a third garnishment. Proceedings had most frequently been brought by commercial loan companies, but grocers, landlords, and others, and even in two cases doctors were among those who had pressed their claims.

Total indebtedness

The total indebtedness of the families, from property payments, taxes, money borrowed, and outstanding bills, was obtained from 621 of the 730 families reporting debts. This is shown in table 6. A partial estimate of their indebtedness was obtained from 86 of the remaining 109 families. Of these more than one-fourth (26) owed at least $500, and 6 more than $1,000.

TABLE 6.—*Amount of indebtedness at date of interview; railway employees included in the study*

Amount of indebtedness at date of interview	Railway employees	
	Number	Percent distribution
Total	980	
Indebtedness reported	871	100
None	250	28
Less than $50	97	11
$50, less than $100	77	9
$100, less than $250	195	22
$250, less than $500	127	15
$500, less than $750	63	7
$750, less than $1,000	37	3
$1,000 or more	36	4
Indebtedness not reported	109	

LOWERED STANDARDS

These debts were not incurred lightly, nor, in view of the age of the group, will they be easy to repay. Railroad workers in general, and particularly the older workers, with their intense and warranted concern for the future, usually resort to every possible economy before they run up bills or borrow money. As the following pages will point out, allowances for recreation, education, housing, clothing, health needs, even food were drastically reduced. These pages cannot pretend to reveal all the facts about every family; undoubtedly some families might have managed better if they had been more careful or better informed. For the majority of the families, however, neither ignorance nor carelessness played a part in the retreat from what had often been a "comfort" standard of living.

Recreation

"And so Sunday comes and we just sit." That is one man's description of his family's recreation; it might be the title of this section. In normal times the wages of the majority of this group permitted a fair variety of amusements, trips, vacations, movie attendance, membership in a club or a lodge, an occasional dance. At the time of the study 378 families (38 percent of the total)

reported that they were having no recreation at all, and for most families recreation had become an "extravagance."

Many reported that they had not seen a moving picture for 2, 3, even 4 years. A 10-cent "movie" once a month for the children was the only recreation in other families.

Trips and outings were no longer possible. Automobiles had been sold or stored. One father who had been criticized by his neighbors for buying license plates upon being reemployed after a furlough explained defensively that he drove the car only to and from work, his only pleasure in a "monotonous and worrisome life." Although passes for the railroad were still available they were not being used because "a trip takes clothes and money." One woman who had a pass reported that she had not seen her mother, who lived 30 miles away, for 18 months as she was ashamed to go in the clothes she had. Picnics were usually out of the question because of the car fare or the gasoline for the car. When public parks and playgrounds were beyond walking distance or charged a small amount for the use of equipment they were beyond the reach of many families. One young father gave up his tennis, although he had access to a free court, since he could no longer afford to buy balls. Others had given up hunting and fishing trips because they could not spare the price of a license. For the men particularly the foregoing of an annual vacation often wrought great hardship. Now when their jobs were more a strain than ever they said they did not dare take off a week; working days were too few.

Lodge, club, even church membership had to be given up. When the dues could be met, shabby clothing often precluded this type of pleasure. The comforting reflection is often made that even when organized social activity may no longer be possible, friends always remain. But the amazing thing is that even such simple activities as the interchange of visits were often out of the question. "If you can't offer your neighbor a bit of refreshment, you don't like to ask him in."

For a large proportion of the families reading also had become a luxury. Subscriptions to periodicals and to daily newspapers had to be canceled in 135 families visited. Circulating-library fees were certainly beyond reach.

What was there to do? One family solved the recreation problem by attending free ball games within walking distance. Others sat at home and tried to play radios rendered erratic by dead tubes, and many did not even have this comfort to enliven the long winter evenings. One woman exclaimed, "It's a wonder we do not hit somebody, we get so tired of each other."

Education

It was not because these people did not realize the need for amusement that they gave it up. Nor was it because they underestimated the importance of education that the young people left school. Before the depression a large number, even from among the low-wage groups, had planned a college education for their children, and the great majority of the families had counted on having their children complete high school. Nevertheless, 157 boys or girls either had dropped out of school or college or had deferred their entrance into the next higher course. Fifty-two of these had dropped out of high

school or grammar school, and 16 elementary-school graduates had not gone on to secondary school. When one considers how small a sum is needed to attend the public schools—enough for car fare, books, clothing—one can realize the poverty of these children.

In addition to the regular school work, a considerable number of the parents had been providing their children with special instruction in music, dancing, drawing, and other arts. At the time of this study 128 children who had been receiving such special instruction had abandoned it.

Housing

The lowered standards of living are also reflected in housing changes. Two hundred and twenty-five families had moved at least once within the last 4 years, mainly to reduce their rent. Some families reported 3 and 4 changes in this period, each time to less expensive quarters. At the time interviewed 39 percent of the families who rented their homes, and 9 percent who owned or were buying them in 1929 were living in other quarters than those occupied in 1929.

In some instances these changes entailed only a less convenient or less pleasant neighborhood, but in half the cases the changes were into smaller, inferior, poorly equipped houses or apartments. Families accustomed to furnaces and hot-water facilities were living in "cold flats", often without electricity or running water. To give up inside toilets and baths, as many families had to, seemed like a reversion to barbarism. Cheap rents are to be found in noisy, dirty, crowded streets, where children must take their recreation and may come in contact with undesirable playmates. Families who moved in together or into smaller apartments complained bitterly of the lack of privacy. In one case 3 families (7 people) had moved into 4 small rooms opening onto a congested court shared by 4 other householders.

Fuel was another item sacrificed in cutting housing costs. Practically all the families economized to some extent in this respect, but 53 stated that this was one of their chief economies. Coke was substituted for coal, and individual burners were used in place of the furnace. All the rooms that could possibly be spared were being shut off to avoid heating them. Often wood was used instead of oil for cooking. According to reports, discarded railroad ties, hardly a satisfactory kind of fuel, were at a premium. A few families economized on lighting facilities, using oil lamps in place of gas and electricity. Others were unable to replace household equipment as it wore out; in some families the need for bedding, linens, and so forth was acute.

As may be supposed, most of the families owning property reported that even necessary repairs were being postponed. Many men would have done this work themselves in their spare time had they had the funds for the necessary supplies.

Clothing

In a country like our own, especially in large cities where social judgments are frequently based on appearance, wearing shabby and worn clothing is a painful economy. When money is scarce much ingenuity is expended in cutting down and making over clothes in

an attempt to seem stylish. There comes a time when no amount of thought and care will revitalize old garments, when the important problems are warmth and decency. Many families of railroad workers had reached this point.

"We haven't bought any clothes since 1930 or 1931", was almost a refrain among the families interviewed. Often the only clothing possessed had been given by friends and relatives, occasionally by relief agencies. Suits and coats were being worn long after the time when the shine on them was embarrassing. Women who formerly bought ready-made silk dresses now made their own from cheap cotton remnants. Children were wearing sneakers instead of shoes to school. Men reported the purchase of one suit, of the $8 kind, in 3 years. Others owned nothing but their work overalls.

For the young people in particular, lack of good clothes was a hardship. They suffered intensely from the remarks of their fellow students. Many older children abandoned school because of shabby clothing. Two young girls possessed only one presentable dress between them; when one went out, the other had to stay at home. Parents, realizing the sensitiveness of children, neglected their own clothing needs to keep them decently attired. One mother and daughter wore the same clothing, the daughter wearing a dress to school while it was fresh, the mother at home afterward. Parents confided that they had borrowed clothing in order to appear respectable at a child's graduation.

Health needs

Conditions like those described here produced an atmosphere best described as "run-down-at-the-heel." When an individual constantly encounters situations he cannot master, when he is forced in spite of all his efforts to retreat foot by foot, he loses courage and assurance—even self-respect. Diagnosis of the individual maladjustment and social friction proceeding from the humiliation and cultural isolation which accompany such seemingly secondary matters as "hand-me-down" clothing, inferior surroundings, and inadequate recreational and educational opportunities requires the skill of trained psychologists and psychiatrists. Physical health needs are more easily ascertained.

Although the most frequent reason for incurring debt was medical care the lack of funds had resulted in a widespread neglect of health. In nearly one-third (30 percent) of the families visited, one or more members required medical attention but could not afford it. Slight illnesses, for which a physician's services would ordinarily have been sought, were subjected to home treatment and drugstore remedies. Repeated requests from school authorities for the removal of children's tonsils were ignored by ordinarily solicitous parents. In some cases, where symptoms of what seemed to be serious diseases were present no diagnosis had been made. A 17-year-old boy suffered from periodic attacks of what appeared to be appendicitis; but examination had been postponed for lack of means. Others who knew they had specific diseases permitted them to take their own course or doctored them as best they could without professional advice and treatment. A woman stated that she had delayed for 2 years an operation her physician had declared necessary as a guard against cancer.

The extent of the neglect of teeth was almost unbelievable. Fifty-nine percent of the families visited reported a need for dental care. Whole families needed fillings or extractions. Active abscesses were being neglected, as well as advanced cases of pyorrhea. Adults had no money to buy artificial teeth. Notices from school that children's teeth should be attended to were disregarded, and in most cities there was no clinical provision for such treatment.

Eyes were not being cared for; 26 percent of the families reported that at least one member needed examination or treatment. Among them were 72 children between 6 and 15 years of age.

When free hospital and pay clinics were available pride often kept these families from attending them. As one woman explained, "It's sure to get around if you go, and then people look down on you." Therefore people were equally reluctant to incur bills they could not pay or to ask for further service until they had paid for what they had already received.

A number of low-paid railway employees had attended free or low-cost hospitals or clinics in the past; 72 families reported that they had resorted to them only in the past 4 years. In some of the communities visited, however, such service was no longer available except when the father was unemployed. Hospitals restricted their care to indigents. Several persons interviewed spoke, moreover, of the humiliation suffered. A woman living in a large eastern city said that her father, who lived with her, had been placed in a hospital for treatment for a serious illness, only to be sent home when investigation showed that her husband was employed, although he could not afford the dollar a day demanded. Besides this the hospital threatened to sue for the cost of the old man's care while he was there. In another case a hospital left a young woman's dental work unfinished when her father found it impossible to continue to pay the weekly installments of 50 cents.

A study made recently by the United States Public Health Service of a group which like this had been reduced from comfortable to moderate or poor circumstances [13] further illuminates the situation. Those who had dropped from "comfortable" to "moderate" incomes showed a rate of disabling illness 15 percent higher than the "comfortable" group, which had suffered no reduction; and for those who descended from "comfortable" to "poor" incomes this rate was 60 percent higher. The chief significance of this report in connection with the railroad workers is that it reveals a close connection between illness and reduction in standards of living.

Food

It is generally conceded that dietary habits are of major importance in physical well-being. What the future will bring as a result of the severe and widespread restrictions in food reported cannot yet be determined, but there is every reason for grave apprehension.

In this study no attempts were made to analyze or judge the expenditures of families. Some effort was made, however, to ascer-

[13] "Comfortable" income is defined as that of $425 and more per capita per year, "moderate" income as from $150 to $424, and "poor" income as less than $150. U.S. Public Health Service: Public Health Reports, vol. 28, no. 41 (Oct. 13, 1933), p. 1261.

tain in a general way the extent to which families had deviated from their usual dietary habits since their income had been curtailed. The reductions reported ranged from 10 to 60 percent of predepression allowance, although they fell most frequently between 25 and 50 percent.

The usual device was to budget a definite sum each week for groceries. As a result the family subsisted on "what was in the house"—soda crackers and beans and flour—when the allowance was used up, as often happened before the end of the week. Other families, without budgeting their food allowance, radically reduced certain items in their diet.

Butter, milk, meat, fresh fruits, and vegetables were most often drastically reduced, occasionally entirely eliminated from budgets. There were few families that did not report a reduction in milk, although the importance of milk for children was generally recognized. Table 7 shows the amount of this reduction in 115 families from which definite information was obtained, together with the drop in income experienced by these families in the year 1932. All these families had children under 16 years of age, the number in the different families ranging from 1 to 6.

TABLE 7.—*Percentage reduction in milk supply and in income since 1929*

Percent reduction in income in 1932 as compared with 1929	Families reporting percent reduction in milk supply				
	Total	Less than 50 percent	50 percent, less than 75	75 percent, less than 100	100 percent
Total	115	10	67	6	32
Less than 10	1		1		
10, less than 20	21	4	14	1	2
20, less than 30	18	1	9	1	7
30, less than 40	12	2	7	3	
40, less than 50	24		16		8
50 or more	28	2	15	1	10
Not reported	11	1	5		5

Butter substitutes lacking in vitamin content, such as oleomargarine, gravy, and grease from frying, were used commonly, and where butter was on the table at all it was served sparingly. Families accustomed in normal times to have meat once a day considered themselves fortunate when they obtained it twice a week. Moreover, cheap cuts and inferior quality were the order of the day. Fresh vegetables and fruits in winter were not thought of; and even in summer few were eaten except by those who owned gardens. As can readily be seen, many families were reduced to monotonous and unhealthful diets, without even an occasional dessert to give flavor to their meals. Corn meal, the cheaper cereals, fat bacon, beans, and potatoes were the staples—many times the only articles of diet.

ACCOUNTS OF INDIVIDUAL FAMILIES

The figures in the preceding chapters have shown the reductions in income that railway men have experienced during the depression and some of the effects of these losses upon the well-being of their families. A more vivid picture of these consequences, however, may be obtained from the personal accounts of some of the families visited during the course of the study. Even a few will suffice to show what is happening.

The 980 families included in the study fall roughly into four general groups: (1) Those who have not been seriously affected by the depression beyond their ability to save but who have been able to maintain their usual standard of living with a few minor economies; (2) those who have exhausted or substantially reduced their reserve resources and drastically reduced their standard of living, but have managed to avoid serious debts; (3) those who, in spite of curtailments, have become seriously involved financially; and (4) those who have been obliged to seek relief, in the form of food or shelter, from outside sources. The families in these groups differed widely, not only as to the size of their income in relation to the number dependent upon it, but also as to the additional obligations they were called upon to meet and the manner of living to which they were accustomed. They differed, too, as to the sacrifices they were capable of making and the extent to which they were willing to reduce their standard of living before utilizing savings and going into debt; some families undoubtedly incurred debts where others were able to avoid them. Any attempt to evaluate these personal factors or to classify families according to their standards of living in relation to their income would be futile with the limited information at hand. It should be kept in mind, however, that railway families, with their fear of garnishment, do not incur debt lightly, and that many of those who had managed to get along without doing so were living under such conditions of lowered standards and even of such deprivation of necessary comforts, as to do them real harm.

In view of the fact that the families included in the study represent as nearly as possible a cross section of employed railway families in each of the communities visited, it is especially significant to find that the large majority, almost three-fourths, fall into the second and third of the four general groups. About the same proportion fall into the first group as into the last—somewhat more than one-tenth.

The first account given here is of a family in this first group that has not been seriously affected by industrial conditions. The majority of these families were those in which the chief breadwinner had suffered no reduction in earnings beyond the 10 percent cut or in which compensating circumstances had made up for larger re-

ductions. Almost half of these families had some income in addition to the earnings of the chief breadwinner. A few, by virtue of a high seniority rating, had received promotions since the year 1929, which compensated, in part at least, for the wage cut. More than one-third of them owned their homes unencumbered, so that they had neither rent nor mortgage installments to pay. Almost two-thirds of them were small families, with no more than four persons dependent upon the family income. Almost half of them were in the higher-income groups of $1,750 or more, even in 1932, when wage cuts and part-time employment policies were in full force.

THE Y FAMILY

Father, 49; mother; child, 9

Financial security of the Y family must be attributed largely to Mrs. Y's "occupations" of raising and selling canaries and sewing, including hemstitching. Mr. Y has been a trucker and loader on a western railroad for 24 years; but his earnings have never been large—usually around $1,300 a year—and Mrs. Y's business has been a permanent and necessary source of income. Now that she has built up a business and developed her aviary to the point where large outlays for equipment and breeders are not necessary, profits have been increasing, even since 1929. The combined earnings of the two have amounted to approximately $2,500 a year. This income has enabled the family to maintain an attractive, comfortably furnished home and has provided them with all they desired in the way of food, clothes, and recreation. It has also allowed a generous margin for savings, which by 1929 had amounted to $3,400.

The only reduction in earnings that Mr. Y has suffered has been due to a shortening of his working week from 6 to 5 days, and the general 10-percent cut in wages. The resultant loss was about $200, or 17 percent of his yearly earnings. This loss has been reflected mainly in the family savings, although Mr. and Mrs. Y have added an average of $250 a year to their account since 1929. Insurance on their car was dropped because they felt they should compensate in some way for the loss of 1 day's work a week, and this seemed to them their most superfluous expenditure. Some of the loss in earnings was reduced by work which Mr. Y obtained, pruning trees.

In this family it was the wife's success with canaries that enabled them to live comfortably. In another, Mr. J's high seniority rating and his expectation of a substantial inheritance were the determining factors. In still others Mrs. L's money in her own right and Miss M's odd jobs, which had as little to do with the pay rolls of the railroads as Mrs. Y's canaries, were the reasons why the families could get along well in spite of the depression.

Approximately 27 percent of the families included in the study fall into the second group of the classification; i.e., the group that had been able to avoid serious debts but only by dint of the most drastic retrenchments and by calling into use all cash savings and convertible assets. In this group education for children of high-school and college age was being postponed or abandoned; recreation was being cut to a serious extent or disregarded altogether, and at times living conditions were being reduced even below the minimum of health and comfort. More than half the families in this group still had cash savings during 1929; at the time of the study, comparatively few had any reserve funds. Most of them had been able to get along without incurring debts only because no exceptional emergencies had arisen; few would have been able to meet from their own resources any unusual demands. Some had already contracted small debts. Others were borrowing, repaying on pay day, and bor-

rowing again. Most of them were harassed by the specter of debt and worried over what the coming winter would bring.

The following stories are illustrative of families in this group:

THE L FAMILY

Father, 51; mother; daughter and her baby; daughter-in-law and her two children, 5 and 6

For the past 7 years Mr. L has been a railroad-crossing watchman in a large middle-western city. Previous to that he had always been a farm laborer except for two periods totaling 5 years, when he worked as a section hand. Before the general 10-percent cut in wages went into effect in 1932 his earnings had amounted to $60.45 per month, or $725.40 per year. On that amount he not only had managed to support himself and his wife but had saved $250 and had carried life and accident insurance with a face value of $2,950. By planning very carefully they had been able to eke out enough to pay Mr. L's union dues and to attend a motion-picture occasionally.

The 10-percent cut in wages was a serious loss, especially so because Mr. L had suddenly become the only support of a family of 7 instead of the chief breadwinner for 2. Early in 1931 a married daughter whose husband was unemployed had come home with her baby; and later in the same year a daughter-in-law and her two children were taken in when the family were evicted, also through unemployment. The son and son-in-law are shifting for themselves, and Mr. L feeds and houses their families. With the number of his dependents increased, a reduction in expenses became absolutely necessary, and so he moved to an inferior house in a less desirable neighborhood, where the rent was only $16 a month. The house faces a common yard which is shared by four families, including 17 children. Here the 7 people live, crowded together in 4 small rooms, on a yearly income of approximately $650.

Mr. L's savings are gone, and he has been obliged to surrender a $500 insurance policy, on which he realized $385. With an instinctive horror of debt and in fear of jeopardizing their future by surrendering further insurance the family sees to it that their expenditures are kept within the monthly income of $54.41. Only $5 a week is allowed for groceries and $1 for meat. When food bills and rent are paid $12 remains to provide fuel, light, clothing, insurance, recreation, and incidentals for the family of seven. Up to the present, however, Mr. L has managed to keep out of debt and to pay his union dues and his insurance. In spite of his increased responsibilities he does not complain but "goes along living in a simple quiet way." He earnestly hopes, however, that the 10-percent cut in wages will be restored so that they can have "a little more to eat and a little more pleasure."

THE M FAMILY

Father, 40; mother; 2 children, 7 and 11

In the city where Mr. M works the positions of baggageman and mail transferman were combined years ago, but from 1924 to 1929 the work was divided, with a foreman in charge of each section. At the time of the division Mr. M was made a foreman of the baggage room. Since 1929 the two positions have been consolidated again for the sake of economy. Mr. M through his seniority rights has been able to hold the job of foreman for the greater part of the time; but in dull seasons, when the man in the position above gets "rolled" to his position, Mr. M in turn is "rolled" to the job of janitor or porter, which carries a considerably lower rate of pay. Consequently, for the past 2 years his monthly earnings have varied from $80 to $136. In 1929 they were $152.

Because they had had many extra obligations to meet in the past, the family had only a small amount of savings ($300) when Mr. M's wages began to fluctuate in 1929. These savings had to be used during the next 2 years to meet current expenses in Mr. M's low-earning months, until they are now exhausted. During the past year (1933) the family obligations have increased. Among other expenditures, a contribution of $50 was made to Mr. M's mother, and a nephew when unemployed for 4 months was given room and board and helped with clothing to the amount of $10. Fortunately the family do not have to pay rent. They live in a house belonging to Mrs. M's mother and keep it in repair and pay the taxes in return for its use.

But even without rent to pay, drastic economies have been necessary in order to keep out of debt. Mrs. M is a good housekeeper and buys and cooks economically. They have been accustomed to a more elaborate diet than they have now, but they get along very comfortably on their present diet, except that they miss the milk. They have cut their daily milk order from 2 quarts to 1. Clothing, of course, was one of the first items on which they economized. Mr. M formerly bought two suits a year; this last year he bought his first one since 1929 and paid $11 for it. Mrs. M, also, bought her first coat in 3 years and paid $12.50 for it. She patches and mends, and clothes the children as cheaply as possible. They had the telephone disconnected 2 years ago, and during last year they gave up the daily paper in Mr. M's low-earning months. They have discontinued their subscriptions to three magazines and now buy one 5-cent publication every other week. When earnings were particularly low, in 1931, they sold their living-room furniture. They now need furniture badly; the little they have is "on its last legs." Also, their supply of bed linen is uncomfortably low, but they "can't spend money on it now." The oldest child has had to discontinue his lessons in expression, which he had been taking for 2 years. Mrs. M regrets this exceedingly, but the lessons cost $1.50 a week, and the family needs the money for food. Probably the economy that the family felt most keenly was Mrs. M's doing her own laundry. In the southern town in which they live this meant a breaking of all traditions and a step down in the social scale. Mrs. M "never thought she could do it", but when Mr. M's earnings were reduced to $80 a month she felt that she had to.

Until 1929 Mrs. M and the children were accustomed to spend their summers in the mountains. Also, in seasons between, they enjoyed trips to the beach in their car and occasional fishing expeditions. Since 1929, however, they have not been out of the city. They have neither the money nor the clothes to go to the mountains, and the use of their car has been restricted to business trips in order to save gasoline. In 2 years they have had only two pleasure trips in it.

Both children need tonsillectomies. The parents wished to have the operations done during the summer of 1933, as the children had lost considerable time from school the year before on account of throat infections; but they had no money and would not go into debt. "When we make a debt", Mrs. M said, "we must know where the money is coming from to meet it."

The H Family

Father, 41; mother; 3 children, 6, 4, and 3

When the field agent was referred to the H family she was told, "This is a family that you will not find so hard hit. They have a car; some money in the bank; and the man's parents own the house in which they live, so they have no rent to pay." But this is what the agent found on visiting the family:

Mr. and Mrs. H have been married about 8 years. Mrs. H had been a trained nurse but had given up her profession when she was married. Five years ago the family had purchased a "nice" car, had furnished a modest but attractive home in the suburbs, and had a "good sum" saved toward the purchase of a home of their own. Today the "nice" car has been replaced by a second-hand one, for which they paid $100; the savings have dwindled to almost nothing; and the family has moved to an inferior apartment in a crowded section of the city.

Mr. H is a towerman (nontelegraphic) with 11 years' seniority rating. His hours of work have not been cut during the depression, and he has suffered only the general 10-percent cut in wages. This has meant an annual loss of approximately $200. His monthly earnings now are $147. Normally the 10-percent cut in wages would not have been a severe hardship. The family would have been able to adjust without any real sacrifice, although they could not have continued to accumulate a reserve. As it turned out, however, this reduction in earnings has been a great loss. As Mr. H expresses it, "Suddenly, instead of being the head of a family of 5, I found myself the chief breadwinner for a family of 8." Until a year and a half ago, Mr. H's father was a flagman for the same railroad as that for which Mr. H works, but at that time the train crews were ordered to do their own flagging, and his father's job was abolished. Because of his age as well as for other reasons he has been unable to find other

employment. Three years ago an unmarried sister, living at his father's home and contributing to the family income, lost her job, and now the whole family is dependent upon Mr. H. They own the 2-story house in which they live and have made every effort to rent the second floor for housekeeping rooms but have been unsuccessful. Rather than "let them out to the welfare bureau for $12 or $15 a month", as some of their neighbors were doing, Mr. H gave up his home in the suburbs and moved into his father's house, paying him $20 a month rent. Mr. H is now the sole support of 2 railroad families instead of 1.

Mr. and Mrs. H have found it difficult to adjust themselves to their changed environment. The house is in an industrial district, bordering the steel mills and factories, and near a chemical plant, the fumes from which permeate the atmosphere day and night. It was in order "to get a breath of fresh air, at least at night", that Mr. H earlier had moved to the suburbs as soon as he could afford to do so. There they had had a modern house, with a large yard where the children could play. There had been stationary laundry tubs and a furnace. Now the laundry must be done in an improvised kitchen on the second floor, and the house is heated by stoves. When the H's moved in they had to buy a stove "on time; something we never did before." They live "side by side, and back to back" to other houses, and the only place for the children to play is the streets. Mrs. H. says that they "have one cold after another" and attributes it to the smoke and fumes from the neighboring industrial plants.

The most rigid economy is being practiced. Mrs. H has given up her "cleaning woman", and no longer meets her friends for lunch once a week as she was accustomed to do. They have discontinued telephone service and also their subscription to the daily paper and four magazines that they had taken for 7 or 8 years. Mrs. H says that they have lost touch with everything since they gave up their magazines and paper. Vacations have been abandoned. Formerly the entire family went on a vacation once a year, but there have been no vacations nor pleasure trips for the last 2 years. They now fear that the car will have to go, which means that they will be "almost confined" to the house. "You can't get around on street cars with small children." Also, their marketing will suffer if they sell the car, because now they drive to the community market on Saturday and buy supplies for a week. "You can't carry home on your arm groceries for a family of eight, and we can't afford to trade at a place that delivers." Already their diet has suffered because they are no longer able to buy in quantities and save the discount. Where they formerly had 3 vegetables at luncheon and dinner, they now have 1; and their milk order has been cut by 3 quarts weekly.

By far the largest number of families included in the study, almost half, belong to the third group—the group which, in spite of drastic curtailments and utilization of all savings and other assets, had incurred serious debts. Not so large a proportion of these families, but nevertheless a considerable number (more than one-third) had had cash savings of at least $100 in 1929, in addition to any investments in homes and insurance that they might have had. Many of these families were supporting unemployed relatives or had had to meet serious illness involving operations and hospital expenses. Quite frequently serious health needs were being neglectd; dental attention was needed almost universally. In many instances children were being taken out of school as soon as they had finished the requirements because they did not have suitable clothes. As in the second group, the education of those of high-school and college age was often being postponed or abandoned. Recreation and all cultural pleasures, including magazines and daily newspapers, were being eliminated, and in some instances living standards had been reduced to the point of actual privation. Many of the families lived in constant fear of garnishment proceedings.

The following accounts are representative of this group of families:

THE C FAMILY

Father, 43; mother; 6 children, 10 to 18

"It isn't so hard to pay a little on this debt, and a little on that, but when you've got to put out $25 in a lump [rent], and only have $65 to begin with, it's tough." Mr. C, a hostler on an eastern railroad, has suffered a reduction in earnings of approximately 22 percent since the beginning of the depression. This is due partly to the general wage cut, but also to the reduction in his working week from 7 to 6 days and to the abolition of piecework. In 1929 Mr. C held the same position as he holds now, but his services were paid for on a piecework basis. He was guaranteed a minimum wage of 71 cents an hour (the same rate he is receiving now except for the 10-percent cut in wages), but usually he was able to make considerably more than that, averaging between $95 and $110 each half month. Now, paid on a straight hourly basis, and with the 10-percent cut, he makes only between $65 and $70 each half month.

Until 1929 he had always been able to keep a reserve of $200 or so in the bank, but in that year he was incapacitated for 5 months by an accident, and since that time has not been able to get out of debt. He was just beginning to see his way clear when his earnings were reduced. At present he is in debt to the amount of $650. He is constantly borrowing, paying back, and borrowing again. In 1932 in order to meet current expenses he borrowed $300 on his furniture from a commercial loan company, paying interest at the rate of 3 percent a month on any unpaid amount over $150. There is still $175 due on this. The same year he borrowed $50 on insurance policies but has since repaid that amount. He owes a grocery bill of $182, a doctor's bill of $150, and 6 months' rent.

When his earnings were reduced drastically in 1932 and Mr. C realized that he was getting deeper into debt he became desperate and "began to make economies." He has given himself a year and a half to clear all debts and is ready to make any sacrifice to that end. The first step in his economy program was to return a $175 parlor suite on which he had paid $75 and a $160 electric washing machine on which he had paid $80. It was necessary for him to have a car in order to get to his work at night, but he sold the one that he had and bought another for $75, which was less expensive to run. As long as he could he borrowed on his insurance policies to pay the premiums, but finally when the cash value of the policies "had almost been eaten up in loans" to pay premiums he dropped them. Two of them would have been matured in another 4 years. Mr. C now carries only $2,500 insurance. The face value of the policies dropped amounted to $3,000.

In order to reduce expenses further the family moved into cheaper quarters, a house much too small for them and inferior to their former home. It is located in the industrial section of the city, with a large expanse of railroad tracks a half block away in one direction and stockyards a few blocks away in the other. Economies have been effected in the household expenses as well as in the larger items of the budget. The milkman was "ordered off" 4 years ago, and the family have had no fresh milk since. Their food is of the plainest sort; there is dessert only on birthdays, which have become the family feast days. They still manage to get something extra as each birthday comes around, though usually it is only dessert and a cake with candles. When the last birthday arrived they had only 10 candles in the house, and they needed 11. It was near pay day and they could "scramble together" only 5 cents. "The children ran all over trying to buy 1 candle, but no storekeeper would break a box, and the box cost 10 cents."

For the past two winters Mr. C said that they have had to buy coal by the bushel—"awful thing to be carrying coal in a basket." When they cannot afford to buy kindling they buy a 10-cent bag of charcoal. Only the most necessary clothing is bought. The children wear 48-cent trousers and 29-cent sweater jackets; this saves buying suits. Mr. C borrowed a suit in which to attend his daughter's graduation. A brother gives him his old work clothes, and Mr. C wears them without washing until they are worn out, in order to save the expense of sending them to the company laundry. The health of the family is being neglected because of their straitened circumstances. The entire family—father, mother, and children—need dental work. Last year, at the suggestion of the school authorities, one of the children was taken to the city-

hospital clinic for dental work; but upon their arrival Mr. C was asked to pay for the services needed, and so he took the child to his own dentist, who would wait for the money. On another occasion he took one of the boys, who had broken his arm, to the city hospital for care; but after waiting from 9 a.m. to 2 p.m. and still receiving no attention he left and went to the family physician.

Recreation and amusements have been reduced to practically nothing. Mr. C was in the habit of taking the children to the beach or motion pictures once a week before his earnings were cut, but this year they "have been penned up like prisoners." The oldest daughter is fond of reading and has always patronized the public library freely; but the neighborhood branch has been closed for lack of funds, and she cannot afford car fare to go to the main library. This daughter, 18 years old, graduated from high school last June. There were times during the year when there was no money for textbooks and times when there was no car fare. She had planned to enter college and specialize in journalism; but for the present that is out of the question, as she has been unable to find a job to earn money for her expenses. She keeps up her writing, however, "hoping that some day something will happen." Before her father's accident she took great pleasure in piano lessons, but these had to be discontinued some time ago. The oldest boy, 17 years old, was attending a vocational school, but his father was afraid that he would have to withdraw before the year was over for lack of proper clothes and car fare. This boy would like to attend art school. Some time ago Mr. C paid $50 for a correspondence course in commercial art for him but was unable to complete the payments; the school now threatens to bring suit for the unpaid balance.

Mr. C is sure that "things will be all right eventually", but he cannot help being discouraged. He lies awake nights thinking what he can do to keep his family from want and to keep the children in school. "On pay day", he explains, "everyone is afraid of me, I get so mad trying to figure out what to do with my money. I am just a messenger boy—I get my pay to deliver it."

The D Family

Father, 33; mother; 3 children, 7 months to 3 years

Mr. D has been employed as a section man on one of the western railroads for the past 9 years. Even in 1929, before employment was being curtailed, he averaged less than $90 a month—including any overtime that he was fortunate enough to have fall to his lot. Until July 1931 he worked fairly regularly 6 days a week, but since that time until very recently he has averaged no more than 3 days. This cut in the number of his working days and the 10-percent cut in wages that went into effect in February 1932 reduced his earnings to a pitiable sum. His income for the calendar year 1932 was about $450—almost 60 percent less than it had been in 1929.

Even before his earnings were reduced Mr. D had never been able to accumulate any savings; but with the help of a garden and a few chickens and hogs, he had been able to keep his family fairly comfortable and to give them a few simple pleasures. They had always lived on a restricted diet, but they had bought milk and fruit freely for the children. Their clothes, though inexpensive, were adequate and presentable. Mr. D took his wife to dances and motion pictures occasionally; they attended church and took part in its social activities; they had occasional automobile rides; and at intervals they took trips to other cities on their train pass.

Since Mr. D's earnings have been drastically reduced, however, life has become unbelievably meager. The family now take only 1 quart of milk daily for the three children and have eliminated fruit from their diet entirely, except during the summer months when prices are lower. Their clothes are few and decidedly worn. Occasionally the grandfather gives them an article of clothing for the children; but the members of the family have bought scarcely anything in the way of wearing apparel for the past 2 years. Pleasure trips of any kind have been dispensed with. Dances and motion pictures are out of the question, and even going to church seems impossible since their clothes have become shabby. Twice during the last 2 years the family have moved in order to reduce their rent. Their present quarters are much inferior to any place they have ever lived before. For the sake of lower rent they have sacrificed a bath, garden space, and room for the chickens and hogs. The close quarters make it more difficult to care for the children, and the loss of their livestock cuts down their food supply.

Living, as they have done, so close to the line of poverty, the D family have become extremely sensitive about anything that suggests charity. They pride themselves on the fact that they have never failed to pay their rent ultimately, although they may have fallen behind for short intervals. Their sensitiveness about charity extends to clinics and dispensaries. There is a free clinic in the city, of which the family might take advantage, but their pride prevents their attending. In the words of Mr. D, "It always gets around if you go, and people will laugh at you." Consequently, in the last 2 years the health of the whole family has suffered. The 2-year-old child has a "weak back" and is troubled with a rash, but has never had medical attention. When the last child was born—in February 1933—no doctor was in attendance, and Mr. D cared for his wife himself. For a day or two he hired a woman to stay with her while he was at work—paying her with a hog—but after she left there was no one but Mr. D to do the work and look after the mother and children. On days that he went to work nothing was done until he returned at night. At the end of a week Mrs. D was up and back at work. Mr. D was worried and distressed over the inadequate care she and the baby received, but it seemed to them there was nothing else they could do. It is the same in the matter of dental work. Both Mr. and Mrs. D need attention but they cannot bring themselves to patronize the clinics.

Since July 1933 work has increased and Mr. D has been employed 5 days a week instead of 3, increasing his average earnings from $37 a month to $65. But even with this additional income he feels that it will continue to be a struggle to keep his family alive. "Things are so run down I don't see how we can continue", said he. He owed $61 to the grocer, $30 to the doctor who attended Mrs. D when the 2-year-old child was born, and $40 on furniture which they had begun to buy before work became irregular. These debts, while comparatively small, loom large to a family that have a horror of owing anyone anything, and who "have scrimped until there is not another penny to be scrimped out of anywhere."

THE W FAMILY

Father, 36; mother; 2 children, 4 and 16

Although Mr. W has been employed 20 years by the railroad for which he now works, he has a seniority rating of only 4 years. Early in 1929 he left its employ for what seemed a better opportunity and returned 8 months later with his seniority rights gone. At the time when he left he was working as a stationary fireman at a basic wage of 63 cents an hour. Upon his return he obtained his old job at the same rate of pay; but soon afterward his working week was shortened from 7 to 6 days, and his earnings reduced accordingly. In June of the same year (1930) he was obliged to take a lower assignment with a further reduction in wage, when, for economy purposes, stationary engineers were ordered to do their own firing, and the firemen were transferred to other duties. Since Mr. W had a low seniority rating the only job open to him was that of roundhouse laborer, paying 36 cents an hour. In February 1932 the general 10-percent cut reduced his wages still further, and in 1933 his working week was again shortened—this time to 5 days. At present he averages about $65 a month as compared with $130 in 1929.

Because of his meager earnings, Mr. W and his family are finding it difficult to live, in spite of the fact that they have reduced their life to a bare, monotonous existence. They have exhausted their savings, accumulated some debts, and economized to the point of actual privation, yet it seems impossible for them to make ends meet. Only the most necessary clothing has been bought for the past 3 years, and expenditures for the table have been so meager that they have sometimes even been hungry. They live on soups, cereals, and puddings. Mr. W suffers with ulcers of the stomach and should have a milk-and-egg diet; but the family no longer take milk regularly, just buying it "whenever there's a spare dime." Mrs. W obtains "city flour" through a neighbor who is "on the welfare", and does her own baking. The laundry, formerly sent out, is now done at home. All insurance has been allowed to lapse except life insurance to the amount of $1,000 carried by Mr. W, which they "do not dare drop." The family have almost no recreation; they have no car and they cannot afford to attend motion pictures. They have discontinued the daily paper and subscriptions to three magazines, and the son has withdrawn from the Boy Scouts. They do not even offer their friends "so much as rolls and coffee" when they come in.

In spite of these curtailments, however, in the spring of 1933 Mr. W found himself unable to pay rent, and in a desperate effort to make ends meet the family took a larger house in a more accessible neighborhood and let rooms. The place is only a short distance from the heart of the city, opposite a busy market, with parking space for automobiles next door; and Mrs. W is afraid to let her 4-year-old daughter play off the porch, as the cars are coming and going almost incessantly all day. There is space enough for a small garden in the rear of the house, and last summer the family tried to grow a few vegetables, but everything dried before maturing for lack of rain. Mr. W wanted to buy a garden hose but "just couldn't get to it on account of the cost", and carrying water in buckets proved too difficult.

Under the new arrangements the income from the lodgers covers the rent, but it does not leave anything to pay on other bills. A friend lent them $50 to defray the cost of moving, and some second-hand furniture was bought from a neighbor. At the time of the purchase they had understood that she would wait for her money, but now she is threatening to garnishee Mr. W's wages, since little or nothing has been paid on the bill. Both Mr. and Mrs. W are "in a nightmare" over the situation, fearing for Mr. W's job. Mrs. W consulted a loan agency, hoping to borrow enough to quiet the neighbor, but they "only laughed" and said Mr. W was not making enough to be a good risk.

Mr. and Mrs. W's oldest boy, 16 years old, graduated from junior high school last June (1933). His graduation suit was bought "on time." There was not money enough to buy shoes, and so he wore sneakers. He entered high school when it opened in the fall and is anxious to finish a 4-year course; but when the family was visited he was afraid that he might have to drop out because his father had not yet been able to buy his textbooks, and it embarrassed him to attend classes without them.

Both Mr. and Mrs. W are in poor health and in need of medical care, but they are not able to pay for it. Hitherto they have never "had any use for free clinics", but Mr. W had about made up his mind to apply for treatment at the city hospital. Mrs. W should not be doing the heavy work about the house and should be under a doctor's care. Mr. W helps all he can, even doing the laundry on his day off, but he also should avoid overstrain.

The P Family

Father, 49; mother; daughter, 15

For the past 13 years Mr. P has been a carman painter for the railroads, at a wage of $5.78 per day. Before the depression his earnings amounted to about $145 per month, and this sum provided a modest but comfortable living for his wife and 15-year-old daughter. He has not received any demotions, and no change has been made in his basic rate of pay since 1929, but the general 10-percent cut in wages and part-time employment have reduced his earnings to less than two-thirds of what they formerly were. With such a reduction he not only has been unable to lay anything aside for emergencies but has even failed to meet expected obligations. Several years ago he put his savings into a small home in an unimproved section of the city. His monthly payments on the house are $31.85—an amount he was able to meet comfortably at the time that he bought it. Recently, however, the street has been paved, and a paving assessment of $165 (to be paid in five yearly installments) has been placed against the property. While he was pondering on how to meet this additional obligation without borrowing money his working week was reduced from 6 to 4 days, and a balanced budget became an impossibility. At present he is in debt to the amount of approximately $900. Last year when Mrs. P was ill $400 was borrowed on his insurance to meet hospital and medical expenses. Only a small part of this has been repaid, and $160 is still outstanding at the hospital. He owes the grocer $50, and the payments on the house are 6 months in arrears. When taxes are due or some extra expense arises, payments on the house have to wait, and now the family are afraid they will lose the property. Mr. P has made efforts to refinance the mortgage through the Home Owners' Loan Corporation but so far has been unsuccessful. The house needs paint, and the roof needs repairing. Mr. P could do the work but cannot afford to buy the necessary materials.

The family had never lived extravagantly; they had never had an automobile, nor even a telephone, but they had lived comfortably. Now the laundry, which formerly was sent out, is done at home by the wife and daughter. The

electric range has been replaced by a second-hand oil stove to save the cost of electricity. The family buy less and cheaper food, and they have given up fresh milk entirely. They have economized to the limit in clothing. Mr. P last summer bought the first suit of clothes he has had in 2 years, paying $8 for it, whereas he formerly would have paid $18 or $20. Mrs. P clothes herself and her daughter "on remnants", doing the sewing herself. All vacations and all recreation have been eliminated. The family had never "been in the habit of spending any money to amount to anything on shows and such entertainment", but had saved for long trips in the summer. The last 2 years they have had to forego these trips. Mr. and Mrs. P have no recreation of any kind, and the daughter's good times are confined to swimming in the neighborhood pool. She has had to give up her violin lessons and has had to drop her membership in a social club to which she had belonged for several years. The dues are only 50 cents a month, but even that small sum cannot be spared, and the expense of the occasional entertaining required is out of the question.

Both Mr. and Mrs. P are overwhelmed by the situation in which they find themselves. The entire family need medical care of one kind or another. Mrs. P should be under the care of a physician, and she and the daughter should have extensive dental work. Both Mr. and Mrs. P need the attention of an oculist. Their chief concern, however, is for the daughter's education. They have always been ambitious for her, and had hoped and planned to send her to college. They realize now that this is an impossibility; but they are determined that she shall at least finish her high-school course, and they hope that she may be able to resume her music later.

The remaining account is that of one of the families in the fourth group of those who, in spite of strenuous efforts to take care of themselves, had been obliged to seek food and shelter from outside sources. This group includes 12 percent of the total, with 42 receiving aid from friends or relatives only and 72 accepting charity from public or private agencies. While many of the breadwinners in this group had been low-paid workers even in normal times—section men, watchmen, and so forth, who might be expected to be the first to need assistance—slightly more than one-fourth had been accustomed to earn from $150 to $200 per month before the depression. The list includes an engineer, a conductor, three section foremen, and nearly 30 men from the skilled shop crafts. Fully one-fifth had had savings accounts of $100 or more in 1929; in several instances these accounts had amounted to $1,000 or more. All, of course, were without reserve resources at the time they were visited in the summer of 1933.

The B Family

Father, 52; mother; child, 10

Since coming to the United States 7 years ago Mr. B has been employed as a section man by a large eastern railroad. The latter part of 1930 his work was reduced from 6 days a week to an average of 12 days a month, and in February 1932 his meager earnings were cut 10 percent by the general wage cut, making them approximately $38 a month. In the summer of 1933 when the family was visited he was just beginning to get 15 and 16 days' work a month, and the extra $10 and $12 added to the $38 he had been making meant "more than anyone would know" to the family.

After his work was reduced so drastically, Mr. B and his family "managed to get along somehow" until the fall of 1932. Mr. B found an occasional odd job, and Mrs. B did some cleaning. They borrowed on a $1,000 insurance policy until its value was only $18, then dropped it. They kept their rent paid and incurred only one debt, $150 to the doctor, which Mrs. B is working out at the rate of $3 a week by cleaning his office 1 hour a day. In September 1932, however, they were obliged to ask the welfare society for assistance and were given a grocery order of $3.75 per week for 6 weeks, and in the winter 2 tons of coal and some clothes. Recently, also, Mrs. B and the child were given eyeglasses, which they have needed "for over a year." Their food has been re-

duced both in quality and in quantity. Meats are limited to sausage, hamburger, and soup meats, and vegetables to potatoes and cabbage. There are no desserts, and no fresh milk has been bought for 3 years. The three tiny rooms where the family live are spotlessly clean but very bare. They have almost no furniture, and nothing to relieve the monotony of their life—no radio, no car, no books, and no newspapers. Occasionally they walk to the park on Sunday, or visit a museum, or "anything that's free", but parks are a long distance from the crowded industrial section where they live, and they have no car fare.

The little girl, 10 years old, is "delicate" and for a year has been going to the city hospital for treatment. Now that she is growing up, some of the street-car conductors will not allow her to ride for half fare. Sometimes she "has to stand on the corner and pass up 1 or 2 cars" until a conductor comes along who does not know her. As there is no place for her to play near her home, she spends most of her time tatting for the neighbors. She is "crazy" to study the violin, but her father says, "Rent comes first, then food, and then, if we have anything left, clothes."

Appendix A.—FAMILIES OF MEN IN THE WATER SERVICE

The water-service employees are given separate treatment here because the technical conditions of their work are in many ways different from those of the great body of railway workers on land. The differences, however, were not such as to protect them from the impact of the depression, and this account will indicate that the 20 families of water-service employees suffered much the same experiences as the 980 families to whom the body of this report has been devoted.

The railroad boats covered by the study were of three types: (1) Ferryboats, for both passenger and vehicular service; (2) steam lighters, i.e., open freight boats operating under their own power; and (3) tugboats, which are used to tow freight carriers without power of their own. Some of the railroads operate only ferryboat and tugboat service; others maintain all three. The composition of the crews on these boats varies with the size of the vessel and the type of service. On ferries they range from 5 to 12 men, the smallest including at least a captain, a first and a second deckhand, an engineer, and a fireman; and the largest including in addition a wheelman (who is next in rank to the captain), a second engineer, an oiler, an extra fireman or two, and one or two porters. Tugboat crews range from 3 to 9 men, including always a captain, an engineer, and a fireman, and usually a first and a second deckhand, an oiler, and a floatman to assist with the barges that are being towed. The larger tugs may carry several floatmen, particularly at night. Steam-lighter crews vary from 2 to 9 men. They usually include a captain, an engineer, a first and a second deckhand, and a fireman. Sometimes 1 to 3 extra deckhands and an oiler are added.

Promotion on some roads is from lowest deckhand upward to captain, and from fireman or oiler upward to engineer. On other roads it is from lowest deckhand upward to either captain or engineer, whichever is preferred. In the latter instance, however, a man may begin his engine-room service as a fireman, in which case he acquires no seniority as a deckhand; and if his position is abolished or is claimed by an employee with a higher seniority rating he cannot displace a deckhand. Tugboat and steam-lighter crews are drawn from one seniority roster and ferry crews from another.

Demotions have apparently been the most important factor affecting the earnings of the men in the water service. These have resulted both from reductions in the number of boats in operation and from the abolition and consolidation of jobs on boats that are still in service. Both passenger and freight traffic near New York have been diverted from the water service by the opening of the vehicular tunnel under the Hudson River and elsewhere by the construction of bridges. In some harbors a system of coordinated towing, under which one railroad serves another when it can be conveniently arranged, has also resulted in the tying up of a number of boats. In one city the possible employment of men in the railroad service has been lessened by the practice of letting contracts for freight transportation to outside companies, and the investigator found a common belief on the part of the men that this was often the result of a financial connection between company officials and these outside concerns. On one railroad, moreover, the elimination of 1 crew had been effected by lengthening the hours of work for the other 2 crews and placing them upon split watches.

Not only have entire crews been eliminated but in many cases particular jobs have been abolished and the work divided among the remaining men. On some boats fewer deckhands and floatmen are carried; on others engineers are now required to do the work formerly done by assistants when vessels are in drydock. On one road the number of deckhands on steam lighters has been reduced from 6 to 2. Porter jobs also have been abolished wherever possible.

For one of the harbors visited the following table presents estimates of the total number of railroad boats, crews, and men employed in 1929 and 1933.

Number of boats, crews, and employees in each class of service in 1929 and 1933 in one city included in the study

Class of service	Number of boats		Number of crews		Number of employees (estimated)			
							Reduction from 1929 to 1933	
	1929	1933	1929	1933	1929	1933	Number	Percent
Total	228	149	540	297	3,905	2,348	1,557	40
Ferryboats	41	38	92	77	904	757	147	16
Tugboats	149	87	404	194	2,648	1,389	1,259	48
Steam lighters	38	24	44	26	353	202	151	42

As the tying up of each boat means the laying off of the entire crew, those at the top of the roster as well as at the bottom, the resulting process of "bumping" can easily be imagined. The ferry crews suffered the least of the three groups; but, taking them all together, union officials in the same city estimated that 21 percent of the men left in the service had experienced demotions with the resulting drastic reductions in pay.

Part-time employment was also an important factor in lowering the earnings of the water-service employees. On one road a 5-day, 40-hour week for these men went into effect July 1, 1932. They are now working about 22 days or 176 hours a month. When the general 10-percent deduction of February 1, 1932, is considered, this means a reduction in earnings, since 1929, of about 26 percent. On another road the tugboat men, though not the other water-service employees, have suffered more drastic reductions. According to reports of union officials these employees agreed in 1921 to work 12 hours a day regularly without punitive overtime and at a lower rate than that paid by other roads, because of the high monthly pay to be gained by working the longer hours. In September 1931, however, the day was cut from 12 to 10 hours, and to 8 hours in the following month. From January 1931 until May 1931 the men were forced to lay off 1 week each month without pay, and from May 1931 until November 1932 they were required to take a week every 2 months. Since that time they have again been losing a week every month, but their hours have been extended to between 10 and 12. If 11 hours is taken as their average day these men at the time of the investigation were working for 37 percent less a month than in July 1929. On a third road the tugboat captains and engineers were requested in May 1931 to sign an agreement to take off 1 day a month, which of course affected the entire crew. When later in the year it was decided to drop off a second day, and early in 1932 a third one, the men were not asked to sign an agreement; the fact was simply announced. In July 1932 a fourth day was dropped, partly as a result of a scheme of coordinated towing.

The following list gives the positions held by each of the 20 men interviewed, as of July 1929 and also as of April 1933, and their earnings in these 2 months. The 1929 figures do not include overtime pay, since this could not be obtained accurately except from records that were not available; but the comparison is made no less significant by this understatement of the losses.

Occupation		Earnings	
July 1929	April 1933	July 1929 (exclusive of overtime	April 1933 (inclusive of overtime)
Captain (ferry)	Look-out (ferry)	$350.00	$139.50
Do	Look-out	350.00	192.65
Captain (tug)	Captain (tug, extra board)	215.00	155.74
Do	Mate (tug)	215.00	107.23
Relief chief engineer (tug)	Assistant engineer (tug)	265.00	165.84
Engineer (tug)	Fireman (tug)	205.00	130.02
Do	Engineer (tug)	160.00	114.86
Do	do	170.00	129.49
Do	do	205.00	176.80
Engineer (tug, extra board)	Deckhand	(1)	116.83
First mate (ferry)	First mate (ferry)	190.00	171.00
First officer	First officer	277.00	213.00
Second officer (extra)	Second officer	244.50	192.20
First assistant engineer (ferry)	Second assistant engineer	240.00	162.00
Second assistant engineer	do	190.00	189.80
Do	Fireman (ferry)	180.00	139.50
Fireman (ferry)	Fireman's helper (ferry, extra board)	150.00	70.06
Fireman (tug)	Fireman (ferry)	150.00	113.85
Deckhand (ferry)	Deckhand (ferry)	135.00	121.50
Second deckhand (ferry)	Second deckhand (ferry)	130.00	116.77

[1] Not reported.

It will be noted that 9 of the 20 employees had been fortunate enough to escape demotions or transfers to the extra board, and that 2 had escaped losses in earnings of more than 10 percent. At the other extreme, 3 men had had their earnings reduced by more than one-half, and the largest number of cases fall in the range of reductions of 20 to 30 percent. The sample is, of course, too small to carry the weight of statistical conclusions, but at least the general tenor of its evidence is borne out by the Interstate Commerce Commission figures, which record a drop in the average earnings of all employees in the railway water service from $1,779 in 1929 to $1,547 in 1933.

As the foregoing list would suggest the families of the water-service employees, like those of other railway men, were finding it difficult to make ends meet. Obligations incurred when they were on a higher wage level have had to be met in spite of reduced incomes. Thus Mr. C's attempt to keep possession of the building in which his family lives had been made difficult by his own demotion from engineer to fireman, by his daughter's loss of a job, and by the unemployment of the relative with whom ownership was shared. In spite of a loan secured at high interest rates the property had already been advertised for tax delinquency. Other families were in similar difficulties, and one had already lost its home. Here, too, as in other branches of the railway service, reduced incomes were being stretched to meet increased obligations. Mr. B, for example, whose earnings had been cut to less than half, had had 2 children born during the depression and for 6 months had given food and shelter to an unemployed brother-in-law, his wife, and 3 children. It is no wonder, therefore, that Mrs. B had dropped her insurance, that Mr. B had borrowed on his, and that the family had had to use oil for both cooking and lighting during 9 months when gas and electricity were cut off. This was an extreme case, but in almost every family living standards had been lowered and savings had been exhausted. At the time of the investigation, 11 of the 20 families visited were in debt, and 7 owed at least $500.

In all these respects the story of the water-service workers is much like that of the larger body of railway workers on land. Field agents found more complaints of long hours even in the face of depression and rather more charges of discrimination against union men. One agent reported that the men in the water service were more prone than other railway men to blame persons rather than conditions for their hardships. But the objective conditions confronting them were very similar, and the human consequences of the depression seem to have been substantially the same.

Appendix B.—SCHEDULE USED BY FIELD AGENTS—EFFECTS OF DEPRESSION ON RAILWAY EMPLOYEES

1. a. Name..... b. Address..... c. R.R. ..... d. City.....

2. a. Pres. pos..... b. I.C.C. rep. div..... c. Yrs. R.R.....
d. Years sen..... e. Age..... f. Relat. to family.....
3. Family: a. Adults..... b. Children: Under 16....., 16 and over (spec.).....
c. Oth. hsld. (spec.).....
INCOME: 4. a. Earn. C.B.W..... b. Mo..... c. Ch.....
5. Other sources (spec.).....
6. Total family income, 1932.....
7. Wage earners: a. Und. 16 yrs..... Emp..... b. 16-18 yrs..... Emp.....
c. 18 yrs. and over..... Emp.....
CHANGES IN EARNINGS:
8. a. Pos. held July 1929..... b. Basic rate, July 1929.....
c. Pos. held Apr. 1933..... d. Basic rate Apr. 1933.....
9. a. Lower assign. accept..... b. Higher assign. accept.....
10. a. R.R. Earn. C.B.W. Apr. 1933..... b. Earn. Oth: Apr. 1933 (spec.).....
c. Time wkd. C.B.W. Apr. 1933..... d. Time lost C.B.W. Apr. 1933.....
e. Usual time: S..... O.....
SAVINGS: 11. a. Savings 1929..... b. Present.....
12. Losses from bank clos., etc. (spec.).....

INCREASED DEMANDS ON FAMILY: 13. a. Contributions 1932.....
b. Relief to indiv. N. In home..... Others (spec.).....

DEBTS: 14. a. Mortgage 1929 N. b. Mortgage increased since 1929 N.
c. Home Oth. (spec.)..... d. Arrears: Prin. Int. N. e. Prop. lost N.
f. Loss: Tot. Par. N. g. Dispos. N.
15. Taxes: a. Increase Decrease N..... b. Arrears: N. Amt..... Yrs.....
c. Property sold N. d. Dispos. N.
16. a. Money borrowed since 1929 N. Amount.....
b. Sources: Friends Bank Comm. Pawn. Ins. Oth. c. Max. int.....
d. Repaid: Total Partial N.
17. Other debts since 1929: a. Amt..... b. Owed to.....
18. Increase in debt since Jan. 1, 1933 N.....
19. Wages garnisheed or assigned since 1929 N.
CHANGES IN LIVING STANDARDS: 20. a. Family owns home N.
b. Family rents house N. c. Evictions suffered N.....
21. Living conditions: a. Doubling up N. b. Change of abode N. c. Inf. accom. N.
d. Pers. per room..... e. Conveniences sacrif. N. (spec.).....
22. Install. buying: Loss of effects since 1929 N. (spec.).....
23. Insurance: a. Life N..... b. Acc. N..... c. Cashed in N.....
d. Dropped—Life N..... Acc. N.....
e. New Ins. since 1929 N.—Life..... Acc.....

24. Household expenses: a. Budget economies (spec.).....
.....
.....
.....
b. Def. rprs., etc. (spec.).....
25. Household effects sold (spec.).....
26. Education:
a. Withdraw. Col..... H.S..... Gr..... Oth..... Reason.....
b. Def. ent: Col..... H.S..... Gr..... Reason.....
c. Other activities abandoned (spec.).....
27. Health a. Needs not met: Physical (spec.).....
.....
.....
Dental (spec.).....
.....
Eye (spec.).....
.....
b. Use of clinics: Pay Free N.....
28. Recreation: a. Type.....
.....
.....
b. Curtailments.....
.....
.....
.....
29. Outside Assistance: a. Agencies Friends Relatives N.
b. Date.....
c. Types: Food Clothing Rent Med. aid Work relief Oth. (spec.).....
.....
.....
d. Regularity.....
30. Measures to increase income:
a. New wage earners: N. Mo. Child. Oth.
b. Spec. ages of children.....
c. B. & l. N. d. Oth. means N.....
Date..... Agent.....

[Back of schedule left blank for notes by field agent]

Appendix C.—INSTRUCTIONS TO FIELD AGENTS—EFFECTS OF DEPRESSION ON RAILWAY EMPLOYEES

Purpose of study

The purpose of this study is to determine the effects of the prevailing depression upon railway employees and their families. Comparatively few facts are available revealing accurately the circumstances in which railway workers and their families find themselves because of curtailed income due to wage reductions and short time, increased family expenses due to enlarged family responsibilities, increased taxes, greater charitable demands, and the like. As against our lack of knowledge concerning the financial situation of industrial workers we have ample evidence showing the financial troubles of our many business concerns, such as banks, insurance companies, manufacturing corporations, and railways. It is important, therefore, that a detailed and scientifically accurate picture be secured of the actual situation of railway employees and their families today, especially as compared with the period 1929 and before.

Nature of field work

The field work in connection with this study will consist of three parts, namely:

(1) Interviews with railway employees and families as per detailed family schedule and instructions.

(2) A brief case history in narrative form for each family, covering salient points of the detailed family schedule. The purpose of this case history is to furnish a more intimate picture of the influence of the depression upon each worker and his family—the hardships suffered and sacrifices made to overcome them.

(3) A summary review of community conditions. This summary is intended to convey in a broad way the agent's impression of what the depression has done to the community or communities in which the railway employees interviewed reside.

Families to be interviewed

It is proposed that the study include approximately 1,000 families in which the chief breadwinner—father, mother, or other—is a railroad employee living with his family. Furthermore, he must have been on the pay roll at some time in April 1933 and at the time of the interview must have at least two persons—children or adults—dependent upon him for support. The chief breadwinner of each family will be from one of the occupational groups represented by the railway unions taking part in this survey and so will be employed in one of a large variety of occupations, such as clerk, boiler maker, section man, signalman, machinist, skilled-trades helper, train dispatcher, station agent, telegrapher, switchman, passenger or freight trainman, locomotive fireman, ferryboat, tugboat, or steam-lighter employee, or laborer in or around engine terminals, powerhouses, or storehouses.

Each union having membership and representing employees in your territory has designated one of its active members or local officers to hold himself in readiness as a contact man to help you in making your contacts with those members of his union and occupational group that you will select to interview. A letter introducing you to these contact men accompanies these instructions. A copy of this letter has also been sent directly to each contact man.

In addition a list will be furnished you containing the names and addresses of all the contact men in your territory, the official title of the union or group of unions they represent, and the occupational groups covered by the unions concerned. (Occupational groups are listed according to Interstate Commerce Commission reporting-division numbers. See instructions for schedule inquiry 2 b, below.) The quota of employees and their families to be interviewed from each group will be designated on this list. The quota for each

occupation will be, as far as possible, in direct proportion to the number of employees in that occupation among railway workers as a whole.

Although the number of families to be interviewed in each labor group is specified, you will have to use a great deal of independent judgment in selecting the individual families falling within each quota. Responsibility for this selection in each locality is entirely with you. The union contact men have been requested to prepare a tentative list of employees to be interviewed. However, you are not to be guided entirely by this list in making your selections. In other words it is not intended to hand-pick the families nor to confine selections to the so-called hard-luck cases which may be found in almost every group of workers these days. The purpose of this survey is to determine what the depression has done to railway workers and their families as economic units of society. Care should be taken also not to overweight the study with employees with high seniority ratings who because of their long period of service have had steadier work and so relatively greater wage income than the men younger in service. To this end it is suggested that agents secure from each contact man the seniority list or lists and, consistent of course with the quotas set, select a name or two from the top of the list, one or more from the middle, and a few from the end.

In some places more employees and their families will be available for interview than time will permit visiting. There are 11 major classes of employees in all, from which the selections for scheduling are to be made. In certain cities, however, all these groups will not be represented or scheduled. Each of these 11 classes, generally speaking, is represented by either one union or a group of federated unions. Thus, for example, the locomotive firemen, hostlers, and hostler helpers (one important major class) are represented by the Brotherhood of Locomotive Firemen and Enginemen, while all the employees working in the shops, engine houses, and car-repair yards (the shopmen) are represented by the Railway Employees Department, American Federation of Labor.

Most of the employees within a given group will live in the same locality; for example, shopmen usually will live in proximity to the shops. In some classes, however, it will be found that the employees are scattered. Station agents, telegraphers, trainmen, and switch tenders will be at the various stations all along the railway. Maintenance-of-way employees will be found both in large centers and along the right of way, living in small cities, isolated places, and the like. The various contact men will be of assistance in locating and contacting the interurban employees necessary to complete a representative sample.

Confidential character of the work

Field agents are requested not to disclose to any outside person information secured by them concerning individuals interviewed. Never tell one family or individual what you have learned from another and never show a filled schedule to anyone.

Method of making entries on schedule

Entries on the schedule should be in ink.

If the instructions do not cover some point that may arise in regard to the schedule, or if there is any question as to the interpretation of any instruction, write for further instructions.

Do not write in the side or center columns; these are reserved for statistical use.

When a series of answers is given check the correct answer. Be sure the check touches the middle of the word or letter. The letter "N" after an inquiry means "No" or "None." If the answer to an inquiry is "No" or "None" enter or check "N"; if it is an inquiry that would usually be answered by a figure, enter "0." If inquiry is inapplicable enter a dash (—). Enter "N.R." (no report) if unable to secure a reliable answer to an inquiry.

Designate all persons in relationship to chief breadwinner in the family.

Notes may be written on the back of the schedule when the answer needs explanation and when there is not room for the full entry on the face of the schedule. In such cases circle the inquiry number and letter on the face of the schedule and write the note on the back of the schedule, giving it the same number and letter as the inquiry to which it refers. Agents are requested to take full notes, not only on schedule inquiries but on any matters that seem

pertinent to the study, as no schedule can indicate all the significant points which may be revealed in the survey. The agent stands a good chance of discovering valuable points of view not even hinted at in the schedule.

SCHEDULE INQUIRIES

1. (a) *Name.*—Enter name of railway employee who is chief breadwinner of the family. Give surname first.
   (b) *Address.*—Enter address of family at date of interview.
   (c) *R.R.* (railroad).—Enter name of railroad by which father or chief breadwinner is employed.
   (d) *City.*—Enter name of city in which family lives.
2. (a) *Pres. pos.* (present occupation or position.)
   (b) *I.C.C. rep. div.* (Interstate Commerce Commission reporting division).—Ascertain from railway employee his present occupation or position; then refer to the mimeographed publication of the Bureau of Statistics, Interstate Commerce Commission, entitled "List of Steam Railway Occupations or Positions in Each Reporting Division together with Alphabetical List and Index to Occupational Classification and Reporting Divisions"; and from this list determine just which occupation or position listed covers the employee being interviewed. For example: If he is a boiler maker's helper, so indicate in the blank space after inquiry 2(a) and in the blank space after inquiry 2(b) indicate his Interstate Commerce Commission reporting-division number, which in this case would be 64. If he is a road freight flagman (through freight) enter in blank space after inquiry 2(a) "Road freight flagman", and after inquiry 2(b) his reporting-division number, which would be 117. When in doubt as to the proper designation of employees by occupations, positions, and Interstate Commerce Commission reporting divisions, consult the local union contact man.
   (c) *Yrs. R.R.* (total years in railroad service).—In calculating total years in railroad service include *all* railroad service, not just the years which the employee has spent on the railroad where he is now employed. For example, a machinist who worked 2¼ years on one railroad as a helper, 3 years as a helper apprentice, and 5½ years as a journeyman mechanic on another railroad and has worked 4 years on the railroad where he now is employed has spent 15 years in railroad service. Therefore 15 should be entered in this case. If the total number of years of service includes a fraction, drop the fraction if less than one-half and raise it if one-half or over.
   (d) *Yrs. sen.* (years' seniority).—Enter here the individual's actual years of service on the railroad with which he is *now* employed. In the example just cited it would be 4 years. His seniority may be as much as his total years of railroad service but under no circumstance can it be more. Usually it will be less.
   (e) *Age.*—Enter age of employee at last birthday prior to interview.
   (f) *Relat. to family* (relationship to family).—Enter here the relationship of the employee to the family of which he is chief breadwinner.
3. Family
   (a) *Adults.*—For the purpose of this inquiry an adult is a person 18 years of age or over. The family consists of father, mother, and unmarried children (own, step, or foster) living at home. Married sons and daughters living at home, and other dependent relatives, such as parent's mother, father, sister, or brother, are "others in household."
   (b) *Children: Und. 16; 16 and over (spec.)* (Children under 16 years of age; 16 years and over; specify ages).—Enter the number of children under 16 years of age and the number 16 and 17 years of age in the family at the time of interview. Give, in a note, the age of each child under 16.
   (c) *Oth. hsld.* (*spec.*) (Others in household—specify).—Enter number of persons—children and adults—other than members of the immediate family, who are living in household. Specify their relationship to the chief breadwinner in the family and state whether they are dependent upon the chief breadwinner. This inquiry is designed to give the composition of the household at the time of visit. Transient visitors should not be included, but members of *family* or *household temporarily absent* are to be included. Under "Others in household" include boarders and lodgers and designate them as such.

INCOME

4. (a) *Earn. C.B.W.* (annual earnings, chief breadwinner).—Enter earnings of chief breadwinner for the calendar year 1932. Before entering earnings take into consideration all losses from short time, unemployment, or wage deductions, and of any additional earnings because of overtime. The computations by which earnings are obtained should be entered on back of schedule in a note. Earnings should include wages from all sources—railroad and other.

(b) *Mo.* (mother).—Enter the mother's annual earnings if she has been gainfully employed at any time during 1932—either at home or away—exclusive of income obtained from keeping boarders or lodgers. If the mother derives any income from keeping boarders or lodgers, enter "B & L" for earnings. If mother is employed at home, enter "H" after the amount of her earnings; if employed away from home, enter "A."

(c) *Ch.* (children).—Enter earnings of all children living at home for any period of the year 1932 that they were at home. Computations should show earnings of each child separately. Earnings of school children should be included, clearly indicated as such in the notes, and grouped last under a heading. "Children's earnings." Enter in a note age of each employed child.

Method of entering calculations of earnings: In computing annual earnings for members of family determine amount of earnings in each occupation or position filled during the year and enter separately, specifying occupation or position in each instance. Sum total of separate entries should, of course, balance with entry on face of schedule in each case. In order to simplify task of checking computations of earnings, agents are requested to be as systematic as possible.

5. *Other sources (spec.).*—Enter here all income—except that from earnings of members of *family*, from charitable agencies, and from boarders and lodgers—such as income from property rents, insurance, benefits, gifts from relatives, and regular contributions from children away from home. Include here also earnings of "others in household" for period in 1932 that they have been in household, indicating in note what the sources are.

6. *Total family income 1932.*—Enter here the sum total of the earnings for the calendar year 1932 of all members of the family living at home, plus income from other sources, *except* from boarders and lodgers, rents, and charitable agencies.

7. Wage earners

Inquiry 7 is intended to show the extent of unemployment among the members of the family. Agent will enter the number of wage earners in the family and the number in each age group employed at time of visit. Irregularity of employment need not be considered here as this is taken care of in inquiry 5. For the purpose of this study include as employed any wage earner on a pay roll at time of visit regardless of the regularity of his employment. Children working after school hours or during vacations should not be entered as wage earners, although their earnings should be entered in inquiries 4 (c) and 6.

(a) *Und. 16 yrs. Emp.* (employed).
(b) *16–18 yrs. Emp.*
(c) *18 yrs. and over.* Emp. (Includes chief breadwinner.)

CHANGES IN EARNINGS

8. (a) *Pos. held July 1929.*—Enter here position employee held in July 1929. Refer to instructions on inquiry 2 (b) (I.C.C. rep. div.) and follow same procedure. Entry here should conform with one of the occupational classifications contained in the Interstate Commerce Commission publication referred to in inquiry 2 (b). If employee is on the extra board indicate this by entering "extra" in parenthesis.

(b) *Basic rate, July 1929.*—Enter here basic rate of pay of employees on job held in July 1929. This rate of pay will be as per the wage agreement which covered his occupational group at that time. Consult union contact man if you need help here. (See inquiry 8 (d).)

(c) *Pos. held Apr. 1933.*—Enter here position employee held in April 1933. Follow the same practice here as in instructions on inquiry 8 (a).

(d) *Basic rate Apr. 1933.*—Enter here basic rate of pay for job employee held in April 1933. This is the rate of pay specified in his present wage agreement and is the rate that would be restored if the present 10-percent pay-roll deduction were allowed to terminate without change. Be sure that the rate entered here *does not* include the 10-percent pay-roll deduction. There are certain jobs on the railroads to which differentials in wages apply. The basic rate as given on the schedule should include this differential. In case of pieceworkers enter basic hourly rate but do not try to reconcile hourly rate with earnings.

9. (a) *Lower assign. accepted.*—The entries here are intended to show how many times the employee has been forced to take lower-paid jobs since July 1929, as a result of which he earned less money. To answer it add together the number of times he has been demoted because his job was abolished, or he was "bumped" (demoted because some one senior to him took his job), or his shop or roundhouse was consolidated, or his work was transferred to a different point, or because of any other change that forced him to take a job at lower pay. If a man is demoted several steps in the ladder at one time, consider this only one lower assignment.

(b) *Higher assign. accepted.*—Ascertain how many times the employee has accepted higher assignments since July 1929; that is, jobs to which higher rates of pay applied and as a result of which he earned more money.

10. (a) *R.R. earn. C.B.W. Apr. 1933* (railroad earnings of chief breadwinner April 1933).—Enter here the total amount of money that the employee earned during April 1933 because of his railroad service. Include all earnings from overtime work.

(b) *Earn. oth. Apr. 1933 (spec.).*—Here list the earnings of all other members of the family contributing to the family income for April 1933. Indicate in note on back of schedule which members contributed and amount of each one's earnings, as for example: Mother, $15; son, $20; daughter, $18. Include here chief breadwinner's earnings from sources other than railroad.

(c) *Time wkd. C.B.W. Apr. 1933* (time worked, chief breadwinner, April 1933).—Secure from the employee the total number of hours or days he worked during April 1933. Some railroad employees work on an hourly basis, some on a daily basis, and others on a mileage basis. Distinguish between straight time and overtime.

(d) *Time lost C.B.W. Apr. 1933* (time lost chief breadwinner, April 1933).—Ascertain from employee how many hours or days he was forced to lose during April 1933 due to shutdowns, layoffs, or short time, as compared with a full-time month in 1929.

The entry for this inquiry should include not only the number of calendar days lost in April 1933 that would have been worked in a normal year on the same job but should include the difference in the number of days called for by the April 1933 job and the July 1929 job. For example if a man held a 7-day job in 1929 and holds a 6-day job now, he has suffered a loss of 1 day per week. In other words the entry in this inquiry is the difference between inquiries 10 (c) and 10 (e).

Time lost is to be divided into straight time and overtime. Calculation of overtime lost is done by subtracting the amount of overtime in April from the amount customarily worked in the same season in 1929. Overtime loss cannot be considered except in positions in which regular overtime constitutes a regular source of income, as in certain roundhouse positions. Irregular overtime is not to be averaged to establish a "customary amount of overtime." If it was irregular, it was not a normal source of income.

(e) *Usual time S.O.* (straight, overtime).—After "S" enter, the amount of straight-time employment customarily provided by the position held by employee in July 1929 (a full-time month) and after "O" enter amount of overtime regularly received in that position.

SAVINGS

11. (a) *Savings 1929.*—Enter total amount of family savings held on July 1, 1929, in banks, building-and-loan associations, and so forth, or invested in stocks or bonds. Do not, however, include investments in property, such as the home.

(b) *Present.*—Enter here the total amount of family savings held at time of visit in banks, building-and-loan associations, and so forth or invested

in stocks or bonds. If bequests or gifts of money have been added to savings since July 1, 1929, include amount in this entry, but explain situation in note. Otherwise, it would appear as though savings had been made from earnings. If savings have increased as the result of sale of assets, explain in note.

12. *Losses from bank clos., etc. (spec.)* (losses suffered by family from bank closings, and so forth; specify).—Enter the total amount of cash loss suffered by the family since July 1, 1929, because of bank closings, building-and-loan association failures, etc. Do not take into consideration any amounts that will be realized on bank or building-and-loan association settlements unless the settlement has been effected and the payments actually received by the family. And do not consider as a loss any funds withdrawn from savings, and so forth, that were used by the family to meet expenses.

INCREASED DEMANDS ON FAMILY

The following items are intended to show the increased demands on the family due to present economic conditions and the effect of these demands upon the financial condition of the family.

13. (a) *Contributions, 1932.*—Enter here total amount contributed by family in the calendar year 1932 to all charitable and unemployment agencies and activities. Include sums donated to relief of any kind (other than that given to individuals) either directly or through deductions for such purposes from railway and other earnings. If no such contributions were made in the year specified, enter "0." Church contributions are not to be included.

(b) *Relief to indiv. N. In home. Others (spec.)* (Relief given individuals. None. By taking them into the home. In other ways—specify).—This inquiry is intended to include any contributions or aid given by the family to persons in need, other than contributions to charitable agencies, company or union relief activities, and so forth. Such contributions should be included under inquiry 13 (a). If the family has made no direct contributions to individuals in need check "N.". If the family has taken into the home any person in need, enter the number of persons so cared for after "In home." Do not include in this number persons who are being given shelter only but who are otherwise self-supporting. When shelter only is given, the money cost is not considerable. This item is intended to cover only responsibilities involving financial outlay. Doubling up of families, and so forth, will be considered under inquiry 21. After "Others" indicate the number of persons not taken into the home but given some other form of relief. On the line below explain the type of relief given. This may be in the form of cash relief, remittance of rent, clothing, food, and so forth. It may also be work relief. Do not list anything, however, which did not mean a cash loss or expenditure on part of schedule family.

DEBTS

14. (a) *Mortgage 1929, N.*—If family had a mortgage on their home or other property July 1929, check "Mortgage." If not, check "N."

(b) *Mortgage increased since 1929. N.*—If family has had to increase the mortgage on the home or other property since July 1, 1929, to raise necessary funds check "Increased." If a new mortgage has been placed for the same reason check "Mortgage." If no change has been made since 1929, check "N."

Refinancing of existing mortgage should not be considered either as taking out a new mortgage or as increasing an old one.

(c) *Home, Oth. (spec.).*—Check to indicate whether new mortgage or increase in existing mortgage applies to schedule family's own home, in which they are living at time of interview, or to other property. If "Oth." is checked, specify type of property, that is, business property in use by family, property rented to others, farm, or other.

(d) *Arrears: Prin. Int. N.*—If family is in arrears with payments on principal or interest on their mortgage check "Prin." or "Int." to indicate which payments they have been unable to meet. If they are in arrears with both, check both items. If they are in arrears with neither check 'N" and dash inquiries 14 (e)-(g), inclusive, as inapplicable.

(e) *Prop. lost N.* (Property lost. None.)—If family has lost property by either foreclosure or forced sale due to inability to meet payments on either interest or principal since July 1, 1929, check "Prop.", otherwise check "N" and dash inquiries 14 (f) and 15 (g) as inapplicable.

(f) *Loss: Tot. Par. N.* (Loss: Total, Partial. None.)—If family's entire interest in the property was lost check "Tot."; if loss was only partial, check "Par."; if family salvaged the amount invested, check "N."

(g) *Dispossess. N.*—Has family been dispossessed from home because of foreclosure on property?

15. Taxes

(a) *Increase Decrease N.*—Check to indicate whether the taxes on any property held by family have increased or decreased in amount since July 1, 1929. If "Increase" is checked, enter amount of increase. If "Decrease" is checked, enter amount of decrease.

(b) *Arrears: N. Amt., Yrs.*—If family is in arrears with its property taxes at date of interview, check "Arrears" and enter the amount in arrears after "Amount." After "Yrs." enter the number of years' taxes represented in this amount. If "N" is checked, dash inquiries "Amt." and "Yrs." as inapplicable.

(c) *Property sold, N.*—Check to indicate whether or not property has been sold for nonpayment of taxes. If "N" is checked, inquiry 15 (d) is inapplicable.

(d) *Dispossess. N.*—Check to indicate whether family was dispossessed after sale of property for taxes.

16. (a) *Money borrowed since 1929, N. Amount.*—Check to indicate whether family has been obliged to borrow any money to meet expenses since July 1, 1929. If "Money" is checked, enter total amount obtained from all sources.

(b) *Sources: Friends, Bank, Comm. Pawn. Ins. Oth.* (Sources: Friends, banks, commercial loan companies, pawnbrokers, insurance, other.)—If family has been obliged to borrow money since July 1, 1929, check to indicate from whom they borrowed. If "Oth." is checked, explain the circumstances in a note.

(c) *Max. int.* (maximum interest).—This inquiry is designed to ascertain whether families who were obliged to borrow, especially those borrowing from commercial loan companies or pawnbrokers, are being charged exorbitant interest. Enter the highest rate of interest paid by the family on any money borrowed since July 1, 1929, and indicate in note to whom paid.

(d) *Repaid: Total Partial N.*—Check to indicate whether money borrowed since July 1929 has been repaid—entirely, partially, or not at all.

17. *Other debts since 1929:* (a) *Amt.*—Enter here the total amount of all other debts outstanding at date of interview and not listed in inquiries 14–16, inclusive.

(b) *Owed to.*—Indicate here to whom the debts shown in inquiry 17 (a) are owed, such as doctor, grocer, landlord. Be specific.

18. *Increase in debt since January 1, 1932, N.*—Enter here the sum total of all debts contracted since January 1, 1932, less all reductions or retirements. If family is not in debt, dash inquiry as inapplicable. If they have not added to their debt since January 1, 1932, check "No." Arrears in payments on mortgages should not appear in this inquiry, even though family went into arrears after January 1, 1932. If, however, a mortgage has been placed on property, since this date to raise necessary funds, the amount of the principal should be included here.

19. *Wages garnisheed or assigned since 1919, N.*—If the wages of the employee have been garnisheed, or if the employee has been obliged to assign them at any time since July 1, 1929, check appropriate item. If not, check "N."

CHANGES IN LIVING STANDARDS

20. (a) *Family owns home N.*—Check to indicate whether family owns its home at time of inquiry. For the purposes of this inquiry, if a family is buying a home, consider that it is owned.

(b) *Family rents house N.*—Check to indicate whether family rents its house.

(c) *Evictions suffered N.*—Has family been evicted from its home since July 1929 because of inability to pay rent? If so, how many times? Explain circumstances briefly in note.

21. Living conditions

(a) *Doubling up N.*—If family is sharing its quarters with relatives or friends in order to economize on rent or table board, each family sharing in the expense, check "Doubling up"; otherwise check "N." If "Doubling up" is checked explain situation in a note on back of schedule. This inquiry is to cover situations only where expenses are shared; if family is giving shelter or board to a family *without receiving any contribution* from the family taken in, check "N" in this inquiry. Such a situation is indicated in inquiry 13 (b).

(b) *Change of abode, N.*—Check to indicate whether or not family has been forced to move to another home for any reason due to the lowering of its income since July 1, 1929. If family moved in order to secure better quarters at the same rent, or for reasons having nothing to do with their financial situation, or if family has not moved at all, check "N."

(c) *Inf. accom. N.*—Check to indicate whether family has had to move to inferior accommodations because of lowered income.

(d) *Pers. per room.*—Enter number of persons per room in home of family. Count all rooms except bathrooms, sheds, and sun porches. This inquiry is designed to show whether or not families have had to crowd into smaller quarters in order to meet expenses. Inquiry is applicable only if family has moved since July 1, 1929, for reasons of economy. Note on back if family is more crowded than in 1929.

(e) *Conveniences sacrif. N. (spec.).*—List here the conveniences, if any, the family has sacrificed in moving to other quarters since July 1, 1929, for economic reasons.

22. Install. buying: *Loss of effects since 1929, N. (spec.).*—If family has lost any effects, such as radio, furniture, or automobile, since July 1929 through inability to meet installment payments, check "Loss" and specify the article or articles lost. If family has suffered no such loss, check "N."

23. Insurance

(a) *Life. N.*—If chief breadwinner is carrying life insurance or has at any time since 1929 carried it check "Life." If he has had no insurance in this time check "N." If "Life" is checked, enter amount carried. Include the amount carried in July 1929 and the amount of any insurance taken out since that date, regardless of whether or not it is carried at the present time.

(b) *Acc., N.*—If chief breadwinner carries accident insurance or has done so at any time since July 1, 1929, check "Acc.", otherwise check "N." If "Acc." is checked, enter amount carried.

(c) *Cashed in, N.*—If any member of *family* has been obliged to cash in any life insurance since July 1929, check "Cashed in" and enter the face value of the policy. The amount recovered should be entered in a note. If no insurance has been cashed in, check "N." This inquiry is intended to show whether or not it has been necessary, in view of losses in earnings and other losses, for the family to sacrifice life insurance. Include all insurance, such as annuities, endowments, and so forth, held by family. This should not, however, include insurance with fraternal orders. Borrowing on life insurance will not be considered in connection with this inquiry, as that question is covered in inquiry 16.

(d) *Dropped—Life, N.—Acc., N.*—If any member of *family* has dropped any insurance, either life or accident, since July 1929, check the appropriate word, "Life" or "Acc.", or both, and enter face value of each type of insurance dropped. If no insurance has been dropped, check "N." If only one type of insurance has been dropped, check "Dropped" and enter amount dropped after appropriate item and dash other.

(e) *New Ins. since 1929, N., Life. Acc.*—If family has taken out new insurance since July 1929, check "Ins." and enter face value after appropriate item. If no new insurance has been taken out, check "N." Give, in a note, the identity of person for whom new insurance has been taken out.

24. Household expenses

(a) *Budget economies (spec.).*—List here and explain specific household economies the family have had to practice to balance the budget. Have they cut out of their diet necessary items such as milk and fresh vegetables? Have they discharged servants? Are they doing their own washing

instead of hiring a washerwoman or sending it to the laundry as was their custom? Have they discontinued telephone service or the use of a family car? Most families have been forced to make budget economies of one sort or another. Each agent will handle the problem in his own way.

(b) *Def. rprs. etc.* (deferred repairs, etc.).—Indicate briefly any needed repairs or replacement work around home or other property, which family has had to defer this spring for reasons of urgent economy. If no repairs or replacement work are needed, dash inquiry as inapplicable.

25. *Household effects sold* (*spec.*).—List here any household effects which family has paid for in full, but which it has had to sell in order to secure much-needed cash. If any household goods have been sold as a result of chattel-mortgage sale, so indicate in special note.

26. Education

(a) *Withdraw. Col., H.S., Gr., Oth.; Reason* (withdrawals from college, high school, grade school, other school; give reason).—The purpose of this inquiry is to show how, if at all, the education of the children in railway families has been affected by the loss in family income since July 1929. After each item listed enter the number of children in the family who have had to withdraw either temporarily or permanently from college, high school, grade school, or any other school they have been attending. In case entry is made after "Oth.", specify type of school in note on back of schedule. After "Reason" explain in a word or two the particular circumstances that made this necessary.

(b) *Def. ent.: Col., H.S., Gr.; Reason* (deferred entrance to college, high school, or grade school; reason).—After each item enter the number of children in the family who have had to postpone entrance to college, high school, or grade school for reasons of family econmy since July 1, 1929. Again specify the particular circumstances that made this necessary.

(c) *Other activities abandoned* (*spec.*).—List any other educational or cultural activities, such as dancing classes, instrumental or vocal lessons, or art classes, to which the children have been accustomed and which they have had to give up since July 1, 1929, on account of reduced family income. Note particularly whether children in family have had to forego purchase of necessary textbooks and other school supplies.

27. Health.—This inquiry is designed to ascertain whether or not the health services to railway-employee families have had to be curtailed, especially since January 1930, because of economic conditions in the home. The important items listed on the schedule, though they will not give a complete picture, will give an indication of the seriousness of the situation.

(a) *Needs not met: Physical* (*spec.*), *Dental* (*spec.*), *Eye* (*spec.*).—Enter here against the proper item any health needs that exist in the family among either children or adults, which should be met but have not been *for financial reasons*. Indicate the nature of the trouble and the person needing attention on account of it. Entry should run somewhat as follows: Physical: Child 12 years—adenoids and tonsils in bad condition. Mother—physical examination. Dental: Child 4 years—several fillings. Father—bridge work. Eye: Child 10 years—examination. Child 12 years—renewal of glasses.

(b) *Use of clinics: Pay, Free, N.*—Check appropriate item to indicate whether family has been in the habit of attending clinics—free clinics or pay clinics—prior to July 1, 1929. Specify whether family has had to change from private physician to pay clinics or free clinics since that time.

28. Recreation.—One of the first things to be curtailed in time of financial stress is recreation and yet at such a period recreational activities of the proper kind are needed more than ever. Inquiry 28 is intended to show how far such activities have been curtailed among railroad families on account of reduction in family income and other demands upon family.

(a) *Type.*—Enter here brief statement as to the type of recreation usually enjoyed by the family, such as clubs, lodges, church social activities, automobile trips, country picnics, fishing, boating, baseball, movies, playgrounds, vacations.

(b) *Curtailments.*—Describe briefly the kinds of recreation dropped because of the *financial condition* of the family and other demands upon it. Entry should run somewhat as follows: "Father—dropped membership in

bowling club. Boy, 12—dropped Boy Scout membership. Whole family—movies once a month instead of once a week. No vacation or summer holiday for children, mother, or father 1932 and 1933."

29. Outside assistance

(a) *Agencies, Friends, Relatives, N.*—Has family received any outside assistance since July 1929? If not, check "N." If it has had help from public agencies or from friends and relatives (exclusive of money borrowed, which was entered in inquiry 16), check appropriate item.

(b) *Date.*—Enter approximate date (month and year) in which family *first* received outside aid.

(c) *Types; Food, Clothing, Rent, Med. aid, Work, relief, Oth. (spec.).*—Check appropriate item to indicate the kind of relief received and amplify in a few words in space provided for that purpose. If items listed do not cover type of assistance extended them, indicate type.

(d) *Regularity.*—Indicate the regularity with which assistance has been received. Show whether it has been regular and continued at definite periods—for instance, weekly or monthly—or whether irregularly but frequently since the first application, or whether it has been received only on a few occasions.

30. Measures to increase income

(a) *New wage earners: N., Mo., Child, Oth.*—Check appropriate items to indicate whether it has been necessary at any time and for any period since July 1, 1929, for members of family *who were not employed before that time* and who would not otherwise have done so, to go to work.

(b) *Spec. ages of children.*—If any children have had to go to work state their ages and if possible indicate the kind of jobs they have had to take.

(c) *B. & l., N.* (boarders and lodgers, none).—Has family taken in boarders or lodgers or both to increase family income since July 1, 1929? Check.

(d) *Oth. means, N.*—Explain any other means used by family to add to its income since July 1, 1929. Did they plant a vegetable garden and sell produce? Did any of the children try to sell newspapers after school hours? Did mother have to resort to such work as laundering for others? Amplify in note if necessary.

○

Defendants' Exhibit 10

Statement showing selected items from the reports of Class I steam railways and their nonoperating subsidiaries, to the Interstate Commerce Commission, years 1913 to 1933, as compiled by the Bureau of Statistics.

Year ended	Dividends declared	Average rate on dividend yielding stock	Ratio of dividends declared to all stock	Year ended	Dividends declared	Average rate on dividend yielding stock	Ratio of dividends declared to all stock
June 30, 1913	$363, 411, 676	6.37	4.45	Dec. 31, 1923	$405, 190, 775	7.26	4.62
1914	447, 403, 590	7.99	5.44	1924	379, 458, 586	6.35	4.23
1915	323, 862, 138	6.29	3.99	1925	404, 540, 334	6.51	4.45
1916	337, 303, 827	6.48	4.08	1926	467, 492, 544	7.28	5.16
Dec. 31, 1916	360, 694, 916	6.74	4.36	1927	561, 927, 657	8.45	6.09
1917	376, 518, 349	6.80	4.40	1928	504, 371, 633	7.09	5.35
1918	334, 410, 696	6.58	3.95	1929	555, 692, 172	7.45	5.80
1919	332, 059, 260	6.32	3.90	1930	508, 505, 010	7.81	6.14
1920	327, 335, 119	6.52	3.87	1931	397, 610, 667	5.46	4.08
1921	453, 081, 922	9.04	5.35	1932	147, 449, 493	4.52	1.51
1922	334, 545, 800	6.35	3.88	1933	156, 067, 399	5.07	1.60

Defendants' Exhibit 11

AFFIDAVIT

Filed October 10, 1934

S. R. HARVEY, a resident of Lakewood, Cuyahoga County, Ohio, being first duly sworn, on his oath deposes and says, that he is the Assistant to the President of the Brotherhood of Railroad Trainmen, a labor organization, with headquarters at Cleveland, Ohio, representing railroad employes engaged in train and yard service.

Affiant further states that he has been a member of said Brotherhood since August 12, 1907, and, continuously from 1913 to the present time, has held various other offices as a representative of railroad employes engaged in train and yard service, such as local chairman, general chairman, and Vice President of said Brotherhood.

Affiant further states that he has had thirteen years in the active service or employment of the railroads, having begun his service as a brakeman on November 10, 1906; that he is 50 years old and has spent virtually all of his adult years in close association with the railroads of the United States and Canada and with their employes; that during the years he has served as an employe of the railroads and as a representative of railroad employes he has become familiar and well acquainted with employment relationships and pension and relief plans and practices obtaining on the various railroads of the United States.

Affiant further states that individual pension plans of the various individual railroad systems in the United States have not served the end of inducing voluntary and legitimate loyalty of employes to the employing railroad managements. On the contrary, affiant avers that such individual pension plans have served as devices of oppression which compel an involuntary attachment of the employe to the

employing railroad management, interfere with his freedom of employment and seriously obstruct the legitimate aims and ends of collective bargaining between employes and managements in the railway industry of the United States.

Affiant avers that pension systems of individual railroads have been widely used as devices to attract railroad employees away from legitimate labor unions and have served such similar purposes for which company unions are noted; that the pension schemes of various railroads have tended to injure the insurance protection that is offered by legitimate labor unions and in such manner have militated against the existence and normal growth of such unions representing railroad employes.

Affiant further avers that many inequities have been foisted upon unsuspecting railroad employees, who, after having paid to the employing railroad large sums of money as pension premiums, have discovered in the late years of their lives that their pensions were denied them on some technicality from which they could not well protect themselves. Affiant asserts that it is generally true that upon the resignation or discharge of an employe, his rights and equities in the pension for which he has paid are entirely lost to him and that the general knowledge of such facts, widely held by railroad employes, tends to encourage dissatisfaction and disloyalty.

Affiant further avers that because individual railroad systems have administered their pension departments in such a manner as to compel obedience, restrain freedom and mobility in employment and interfere with the free choice of employes as to their representatives for purposes of collective bargaining, such pension systems and practices have seriously impaired the spirit of loyalty and the sense of satisfaction that might otherwise exist in the employment relationship between railway employes and their employers. Affiant further avers that this feeling of coercion and restraint, which compels obedience rather than inspires loyalty, will be entirely removed as a result of the national pension system by which all employes are uniformly protected by federal law in the enjoyment of their pension rights and pension benefits; and further deponent saith not.

(Signed) S. R. HARVEY.

STATE OF OHIO,
County of Cuyahoga, ss:

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid this eighth day of October, A. D., 1934.

[SEAL]

W. A. DENDLE,
Notary Public.

My Commission expires Nov. 8, 1936.

Defendants' Exhibit 12

AFFIDAVIT

Filed October 10, 1934

STATE OF IOWA, LINN COUNTY, ss:

I, J. A. PHILLIPS, being first duly sworn, depose and say I am the duly elected, qualified, and acting President of the Order of Railway Conductors of America. I have been engaged in railroad service for a period of forty years. Since 1916 I have held various offices in the Order of Railway Conductors of America beginning with the position of General Chairman for the Conductors on the Chicago, Rock Island & Pacific Railroad Company, and for a number of years I have held various offices in the international order known as the Order of Railway Conductors of America. For a number of years I was one of its Vice Presidents and spent much of my time in the field, over the territory covered by the Order of Railway Conductors of America, dealing with difficulties between the men on the various railroads and the railroads. In these various capacities, I have had occasion to learn, from first-hand information, of the feelings and attitude of conductors, employed on various railroads throughout the country, towards voluntary pensions provided by the railroads.

I understand it is claimed by the railroads that these voluntary pension provisions, furnished by various railroads to their men, create and maintain a spirit of loyalty on the part of the men to the employing railroad company. My wide experience and observation has taught me that the employe who receives a voluntary pension from the railroad company or who works for the railroad company with the expectation of receiving a voluntary pension does not have his loyalty to the railroad company increased thereby. In the first place, he recognizes that the pension can be decreased or withdrawn, so that it lacks entirely the element of certainty or permanency. In a sense, he regards the promise of or the giving of such a pension in the nature of a bribe or a threat. On the one hand, he feels that the promise of a future pension is an effort on the part of the railroad company to buy his loyalty to the property and the railroad company, and on the other hand, he feels that the promise of, or the pension is used against him to prevent him from asserting his claims for fair wages and working conditions from the railroad company. While in occasional instances, a very few men may have a sense of added loyalty to their employe by reason of the promise of or the giving of a pension, on the whole and in the very, very large majority of cases, it does not have that effect.

On the other hand, the Railroad Retirement Act recently passed by the Congress of the United States gives the railroad employe a feeling of security. He will feel much less restless and aggressive in his demands for improved wages and working conditions; he will feel that contributions are being made from all parties interested toward a fund which will materially assist him in his old age and protect him in his security of a position for himself and a living for his family. Moreover, railroad men, generally speaking, have an antagonistic feeling toward the voluntary pension acts because they do

not take into account services that may have been performed on different railroads. They feel that conductors' seniority rights should have credit for services rendered on any and all railroads when the time for allowing pensions arise. They know, and their experience has taught all of us, that conditions over which the employe has no control often result in loss of employment. They feel that they should not be penalized in their pension prospects or rights by reason of these various circumstances over which they have no control. The right to a pension should be based upon length of time of service in the industry rather than upon length of time in the service of any particular railroad company.

The prospects of and rights to a pension should be definite and certain and not dependent upon the whims of personnel of management of railroads or the conditions of traffic and otherwise which may from time to time arise.

Based upon my experience as a railroad man and my many years of service as a representative of the conductors of the United States and Canada, it is my deliberate judgment and opinion that the railroad Retirement Act is not only more just and humane in its results but also that it will make for greater stability in railroad service and result in equal, if not greater, loyalty to the employing companies than attains today under the various voluntary pension systems in vogue on various railroad properties. It will very greatly add to the security in life of the railroad employe and bring about a much greater measure of contentment, loyalty of service, and satisfaction in life. It will thus greatly inure to the benefit, not only of the employes of the railroad company, but of the railroad company itself and the public at large.

Done at Cedar Rapids, Iowa, this 8th day of October, A. D. 1934.

(Signed) J. A. PHILLIPS.

Subscribed and sworn to before me by the said J. A. Phillips this 8th day of October, A. D. 1934.

[SEAL]

(Signed) S. M. HOFFNER,
Notary Public in and for Linn County, Iowa.

My commission expires July 4, 1936.

Defendant's Exhibit 13

AFFIDAVIT

Filed October 10, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss.

MURRAY W. LATIMER, being first duly sworn, deposes and says:

I am the same Murray W. Latimer who has made two affidavits in this cause and have the qualifications set forth in the first of said affidavits as an expert in the field of industrial pensions and retirement insurance. It is the purpose of this affidavit to elaborate somewhat upon statements I have previously made and to supply certain additional facts concerning superannuation on railroads and the effect of the Railroad Retirement Act upon withdrawals of employees from the service of carriers.

1. *Superannuation on railroads.*—The percentage of employees in the railroad industry who were 65 or over was 3.43% on April 1, 1930, as stated in my first affidavit. According to the Parmelee table, referred to in my second affidavit, the percentage of employees 65 and over was 4.25% on January 1, 1932. The study conducted by me for the Federal Coordinator of Transportation indicated that the percentage had risen to 4.65%. Thus, the relative number of persons 65 and over rose 35% in less than 4 years. By reason of the continued decline in retirements during 1934, as set forth in my first affidavit, it is certain that the percentage was greater on the effective date of the Act than at the beginning of the year.

There are in the service of the Class I railroads at the present time not less than 48,000 persons who have passed their 65th birthday. The average annual compensation of this group of aged employees was in 1933 not less than $1,765 and their total annual compensation about $85,000,000. The average annual compensation of all railroad employees in 1933, according to the study made under my direction for the Federal Coordinator of Transportation, was $1,319. The retirement of employees over 65 and their replacement, probably only in part, by younger persons, would undoubtedly produce pay roll economies.

2. *Effect of the Railroad Retirement Act upon withdrawal of employees from the service of carriers.*—There are no grounds for supposing that the Railroad Retirement Act will result in the withdrawal of employees from the service of all carriers. In the first place, the voluntary withdrawal of persons of long service, even the maximum service, in any significant number is at the present inconceivable; they would be unable to secure jobs. Second, as for younger employees, the accumulation of assured annuities would be a factor tending to retain them in the industry rather than acting as a force to encourage withdrawal.

The Retirement Act, of itself, would not stand in the way of a transfer from one carrier to another. This is no disadvantage to the industry. It has gone on for many years. According to data compiled under my direction for the Federal Coordinator of Transportation, 22% of the persons in rail service on January 1, 1934, had been in the service of more than one carrier.

By the Transportation Act of 1920 which still represents a national policy, Congress undertook to provide a uniform national system of transportation. Transfer of employees from one carrier to another will tend to facilitate uniformity of service standards and bring about uniformity in policy and technique of great value to the unification of that national system. Insofar as the voluntary pension systems have stood in the way of free transfer, and the affidavits of the plaintiffs assert that such has been the case, these systems have thwarted the achievement of the national policy.

MURRAY W. LATIMER.

Subscribed and sworn to before me this 10th day of October 1934.

FRANK E. CUNNINGHAM,
Clerk.

By H. B. DERTZBAUGH,
Asst. Clerk.

Plaintiffs filed the following written objections to the introduction of certain portions of defendants' affidavits, which affidavits were admitted in evidence over said objections, to wit:

PLAINTIFFS' OBJECTIONS TO AFFIDAVIT OF JOSEPH B. EASTMAN

Plaintiffs object, separately and severally, to certain portions of the affidavit of Joseph B. Eastman, filed by the defendants in this cause, and move specifically as to each of those portions that it be struck out. The portions thereof to which plaintiffs object and the grounds of plaintiffs' objections are as follows:

I

The first paragraph on page 4 of the affidavit beginning with the words "The experience with", on the ground that said paragraph is incompetent, irrelevant and immaterial, in that the character and value of voluntary pension systems in effect on the railroads of some but not all of the plaintiffs are not an issue in this case and throw no light on whether the Railroad Retirement Act is valid.

The Court overruled the objection; plaintiffs excepted, which exception was allowed. Thereupon plaintiffs' attorney stated that he had written objections generally of like nature to other parts of the Eastman affidavit and also to parts of certain of the other affidavits; that, in order not to interupt the reading of the affidavits, if satisfactory to the Court and to opposing counsel, he would later file them with the Court as he had them written out and the Court could rule on them after the case was submitted and the record would show the party ruled against was allowed an exception. The Court said that was better and opposing counsel consented.

In pursuance of the foregoing record agreement the plaintiffs file herewith the following objections:

1. To certain portions of the remainder of the affidavit of Joseph B. Eastman, set out in the objections.
2. To the first affidavit of Murray W. Latimer.
3. To the second affidavit of Lee M. Eddy.
4. To the affidavit of Otto S. Beyer.
5. To the second affidavit of Murray W. Latimer.
6. To the affidavit of S. R. Harvey.
7. To the affidavit of J. A. Phillips.

The plaintiffs object separately and severally to certain portions of the remainder of the affidavit of Joseph B. Eastman, filed by the defendants in this cause, and move specifically as to each of those portions that it be struck out. The remaining portions thereof to which plaintiffs object and the grounds of plaintiffs' objections are as follows:

II

The second paragraph on page 4 of said affidavit, beginning with the words "In the light of", on the ground that said paragraph is incompetent, irrelevant, and immaterial, for the reason that affiant's opinion as to whether or not a retirement and pension system is desirable is of no probative value with respect to the validity of the Railroad Retirement Act.

III

Speech of Joseph B. Eastman attached to his affidavit, on the ground that said speech is incompetent, irrelevant, and immaterial, does not relate to the specific issues in this lawsuit, but is a general discussion of railroad problems in which the affiant expresses numerous opinions and conclusions that in no way relate to the issues that are before the court. Plaintiffs are under no obligation to search the speech to determine whether or not some relevant statement of fact may possibly be found therein.

PLAINTIFFS' OBJECTIONS TO AFFIDAVIT OF OTTO S. BEYER

Plaintiffs object, separately and severally, to certain portions of the affidavit of Otto S. Beyer filed by the defendants in this cause, and move specifically as to each of those portions that it be struck out. The portions thereof to which plaintiffs object, and the grounds of plaintiffs' objections, are as follows:

I

The last paragraph of Section I on page 3, reading:
"In view of these facts it is my definite conclusion that the systematic retirement of superannuated employees, substantially in keeping with the plan now provided by the Railroad Retirement Act, is indispensable to the safe and efficient conduct of the industry and is, therefore, in the public interest."
on the ground that the statement is incompetent, irrelevant, and immaterial because it is a conclusion of the witness on one of the issues which is before the Court for decision.

II

Section II of the affidavit, beginning on page 3 and ending on bottom of page 5, on the ground that the matter on said pages is incompetent, irrelevant, and immaterial, in that the character and value of voluntary pension systems in effect on the railroads of some but not all of the plaintiffs are not an issue in this case and throw no light on whether the Railroad Retirement Act is valid.

PLAINTIFFS' OBJECTION TO AFFIDAVIT OF S. R. HARVEY

Plaintiffs object and move to strike the last paragraph on page 1 of the affidavit, beginning with the words "Affiant further states" and ending with the words "Industry of the United States" on the ground that the statement is incompetent, irrelevant, and immaterial, in that the character and value of voluntary pension systems in effect on the railroads of some but not all of the plaintiffs are not an issue in this cause and throw no light on whether the Railroad Retirement Act is constitutional.

PLAINTIFF'S OBJECTIONS TO AFFIDAVIT OF J. A. PHILLIPS

Plaintiffs object separately and severally to certain portions of the affidavit of J. A. Phillips, filed by the defendants in this cause, and move specifically as to each of those portions that it be struck out. The portions thereof to which plaintiffs object and the grounds of plaintiff's objections are as follows:

I

The paragraph beginning on page 2, beginning "I understand it is claimed, etc.", and ending on page 2 with the words "* * * it does not have that effect", on the ground that the statement is incompetent, irrelevant, and immaterial, in that the character and effect of existing voluntary pension plans in effect on the railroads of some but not all of the plaintiffs are not an issue in this case and throw no light on whether the Railroad Retirement Act is valid.

II

The third sentence on page 3, beginning with the words, "Moreover, railroad men, generally speaking, etc.", through the sixth sentence on said page ending with the words "* * * over which they have no control", on the ground that the statement is incompetent, irrelevant, and immaterial in that the character and value of voluntary pension systems in effect on the railroads and the statement of the witness as to how railroad men regarded such systems and the objections they have thereto are not an issue in this cause and have no probative value herein.

III

Paragraph 2, page 3, reading:

"The prospects of and rights to a pension should be definite and certain and not dependent upon the whims of personnel of management of railroads or the conditions of traffic and otherwise which may from time to time arise."

on the ground that the statement is argumentative, states no facts, and is a conclusion of the witness.

PLAINTIFF'S OBJECTIONS TO SECOND AFFIDAVIT OF LEE M. EDDY

Plaintiffs object to the second affidavit of Lee M. Eddy filed by the defendants in this cause and move to strike the same upon the ground that it is irrelevant, immaterial, and incompetent, in that it is a discussion of existing voluntary pension plans in effect on the railroads of some but not all of the plaintiffs and has no bearing upon any of the issues in this case.

PLAINTIFFS' OBJECTIONS TO FIRST AFFIDAVIT OF MURRAY W. LATIMER

Plaintiffs object separately and severally to certain portions of the first affidavit of Murray W. Latimer filed by the defendants in this cause and move specifically as to each of those portions that it be struck out. The portions thereof to which plaintiffs object and the grounds of plaintiffs' objections are as follows:

I

Pages 3 to 27, inclusive, of said affidavit, beginning with the title "Inadequacy of Individual Resources to meet Hazards of Old Age" and ending just before the title "The Crisis of Voluntary Pension Plans" and severally to each of the topical subjects and the matter set forth thereunder on the ground that the matter set forth on these pages and under each of the topical headings is incompetent, irrelevant, and immaterial in that it does not relate to any of the issues in this case, throws no light thereon and has no probative value.

II

That portion of said affidavit beginning on page 27 with the title "The Crisis of Voluntary Pension Plans" and running to the title "The Railroad Retirement Act" on page 34 on the ground that the matter on these pages is incompetent, irrelevant, and immaterial in that it relates to the voluntary pension plans existing on certain of the plaintiffs' railroads and is not germane to any issue in this case. It states the trend of events in the United States as regards old-age protection, traces the history of State pensions, refers to the railway retirement systems in France, Argentina, Canada, Cuba, Paraguay, Brazil, and Uruguay, none of which facts, if true, have any probative value or any bearing on any issue in this case.

III

The remainder of said affidavit beginning with the title "The Railroad Retirement Act", page 34 and ending at the bottom of page 45, on the ground that the matter on said pages is incompetent, irrelevant, and immaterial in that it is argumentative and not a statement of material facts. It being immaterial how the witness construes the Act or explains any of the provisions thereof, the witness' statement as to whether the Act is reasonable or whether there are strong social sanctions for it is not competent evidence.

PLAINTIFFS' OBJECTIONS TO SECOND AFFIDAVIT OF MURRAY W. LATIMER

Plaintiffs object separately and severally to certain portions of the second affidavit of Murray W. Latimer, filed by the defendants in this cause, and move specifically as to each of those portions that it be struck out. The portions thereof to which plaintiffs object and the grounds of plaintiffs' objections are as follows:

I

That portion of the second affidavit beginning on page 9 with the title "Comparison with Prior Service Costs under Voluntary Plans" and running through and including page 11 thereof, on the ground that the matter on said pages is incompetent, irrelevant, and immaterial in that it relates to voluntary pension systems in effect on the railroads of some but not all of the plaintiffs and has no bearing on any of the issues in this case.

II

The first paragraph on page 13 beginning, "That the percentage of compensation of", etc., and running to the end of the affidavit which closes with the words "* * * are not unreasonable", on the ground that said parts of the affidavit are incompetent, irrelevant, and immaterial, in that they relate to pension systems in foreign countries, deal with the percentage of wages required in Argentina, measured in pesos, relate to the miners' and salaried employees' old age insurance systems of Belgium, relate to the Cuban pension system, and if such evidence be true it has no competency in this case and refers to no issue herein.

Defendants thereupon closed their case.

EVIDENCE IN REBUTTAL FOR PLAINTIFFS

Plaintiffs offered in evidence the following affidavits identified as Plaintiffs' Exhibits Nos. 35 to 50, respectively:

Plaintiffs' Exhibit 35

AFFIDAVIT

Filed October 11, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

WILLIAM F. THIEHOFF, being first duly sworn, deposes and says:

Affiant is General Manager Lines East, Chicago Burlington & Quincy Railroad Company, with headquarters at Chicago, Illinois. He makes this affidavit with knowledge that it is to be used as evidence in the above-entitled cause.

Affiant started work with the Chicago, Burlington & Quincy Railroad Company when he was sixteen years old and has been continuously employed with that company ever since; that is, for fifty-one years. Affiant started as Section Laborer. He learned telegraphy and went into telegraph service, then into train service as Brakeman, following through as Conductor and Yardmaster. Affiant was promoted to Trainmaster January 1, 1905. Affiant has since been an officer in the Operating Department in the following grades: Assistant Superintendent, Superintendent, General Superintendent, Assistant General Manager, and General Manager Lines East, which position he now holds.

During his railroad experience affiant has long been closely concerned with labor matters and relations between employees and employer, both as a labor organization representative and as a railroad official. From about 1902 to 1904, while affiant was employed as a conductor on the Chicago, Burlington & Quincy, he served as Vice Chairman of the General Committee of Adjustment of the Order of Railway Conductors for the Burlington System, and as such he handled negotiations on behalf of the conductors' organization with the management. After affiant was appointed to official position he has been in constant touch with labor matters. Affiant was a member of the Western Conference Committee of Managers 1924 to 1928, was Chairman of the Conference Committee of Managers, handling national wage negotiations, 1932 to 1934.

At the time of the national agreement of January 31, 1932, between the so-called Willard Committee, representing the railroads on the one part, and the Labor Executives Association on the other part, providing for a ten percent wage deduction for a period of a year, at the request of the labor representatives, as stated in the affidavit of Lee M. Eddy in this cause, the railroads named a committee to confer with labor's representatives on various other matters including the subject of retirement insurance. Such committees met and discussed these subjects.

Affiant was Chairman of the Conference Committee of Managers, popularly called the Thiehoff Committee, which, as representatives of the railroads, handled subsequent negotiations and agreements regarding wages with the labor organizations' committee, known as the Whitney Committee. These negotiations first resulted in a further agreement extending the ten percent deduction until October 31, 1933. After intervention of the President of the United States and of the Federal Coordinator, a further agreement, commonly known as the Eastman Agreement, dated June 21, 1933, still further extended the deduction agreement to June 30, 1934. After further negotiations, prior to June 30, 1934, the whole matter resulted in a compromise agreement dated April 26, 1934, commonly known as the Washington Agreement, which provided for a gradual restoration of the deduction until the total ten percent will have been restored as of April 1, 1935.

During all these negotiations the wage controversy was the only matter in issue. The final compromise agreement of April 26, 1934, resulted to the full satisfaction of the employee representatives. On that date the President of the United States publicly congratulated both parties in the following statement:

"I am very glad that the railroads and their employees have been able to settle their wage dispute by mutual agreement. The country should be, and will be grateful to them for this disposition of what might have developed into a troublesome controversy. I congratulate both sides on the wisdom and restraint which they have exhibited. They have set a good example."

The President further wrote Mr. Whitney, of the Whitney Committee, representing the employees, a letter dated April 30, 1934, which was made public, and in which the President said:

THE WHITE HOUSE,
Washington, April 30, 1934.

MY DEAR MR. WHITNEY: Thanks very much for your letter of April 26th with its enclosure of the signed agreement.

Naturally, the news of the settlement of the differences between the railroads and their employees was received by me with much satisfaction. Such settlements between the employer and labor are an augury of better days, a wholesome sign that we are making progress toward a more favorable condition in industry.

I am deeply grateful to you and your associates, as well as to the representatives of the railroads, for your patience and broad-minded attitude that made possible this happy outcome of the situation.

Very sincerely yours,

(Signed) FRANKLIN D. ROOSEVELT.

A. F. WHITNEY, Esq.,
Chairman Railway Labor Executives' Association.
820 West Superior Ave., Cleveland, Ohio:

From the time that the matter of pensions was studied and discussed between the respectice committees pursuant to the Willard Agreement in 1932 the subject of pensions or retirement insurance was never a matter of negotiations nor was it ever made an issue in any controversy between the representatives of the employees and representatives of the railroads up to the present time. On the contrary, the Whitney Committee announced to the Thiehoff Committee early in their negotiations about the wage controversy that the employees would handle the question of pensions or retirement insurance as a part of their legislative program rather than as a subject for negotiation.

On Monday, February 26, 1934, there was a national conference between a committee of railroad executives representing all regions of the country and the grand officers of the four train service organizations, held in New York City, for discussion of various forms of proposed legislation affecting railroads and their employees. In the report of the secretary of that meeting the following appeared with reference to the question of pensions:

"Reference was made to the question of social legislation, such as pensions. The Labor Executives stated that, as the Coordinator is making an actuarial study of Pensions, etc., which, when completed, will be the basis of the Coordinator's recommendation to the Congress for Pension Legislation, it was suggested and agreed to that the Carriers' Pension Committee will meet with the Employes' Pension Committee when the Eastman report is issued and make joint study of it."

This agreement thus postponed until the completion of the Coordinator's study and his recommendation of pension legislation to Congress all further discussions between the respective pension committees of the railroads and the employees. The Railroad Retirement Act was passed by Congress before the Coordinator had completed his studies and made any recommendation as to pension legislation.

And affiant further states that throughout the whole period of his employment in railroad service, from about 1883 to the present

date, the question of pensions or retirement insurance has never been made the subject of an issue or of any threat of disruption of relations between the railroads and their employees, either nationally or regionally.

WILLIAM F. TIEHOFF,
(Affiant)
General Manager, Chicago, Burlington & Quincy Railroad Company,
Chairman, Conference Committee of Managers,
Chicago, Illinois.

Subscribed and sworn to before me this 5th day of October 1934.

[SEAL] P. K. HOWARD,
Notary Public.

My Commission expires May 24, 1935.

Plaintiffs' Exhibit 36

AFFIDAVIT

Filed October 12, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss:

WILLIAM L. HARTMAN, being first duly sworn, on his oath deposes and says:

That he is a duly licensed physician and surgeon, having practiced his profession for upwards of 45 years; that he has acted as a surgeon and physician in connection with railroad service for over 33 years; and that he was Chief Surgeon of the Michigan Central Railroad from the year 1917 to the year 1931, at which time he was appointed Medical Director of the New York Central Lines (including said Michigan Central Railroad, the Cleveland, Cincinnati, Chicago & St. Louis Railroad, Pittsburgh & Lake Erie Railroad, the New York Central Railroad, and several smaller roads, which, together with those named, constitute the so-called New York Central Lines), and holds that position at the present time. On said railroads, the affiant is in charge of the physical examination of applicants for employment, of physical examination of employees for purposes of promotions, of periodic physical examinations, and of all reexaminations. This work includes the fixing of practices for such examinations by local surgeons, and the scope thereof, and also includes review of the reports of such local surgeons and the determination of action to be taken with respect to treatment.

The affiant is also, and for a number of years has been, a member of the Committee of Direction of the Medical and Surgical Section of the American Railway Association, and was Chairman of that committee in 1933–34. The heads of the medical and surgical departments of practically all of the railroads of the United States and Canada are members of the said Section of the American Railway Association, and participate in its work. The affiant personally is acquainted with most of the chief surgeons of the Class I railroads of the United States and Canada, and is a past president of the Chief Surgeons Association.

Following the formulation by the said Medical and Surgical Section of the American Railway Association of rules and requirements governing physical examinations, including sight, color-sense, and hearing tests, for entrance to service, promotion, periodic, and special examinations, with method of conduction, these rules and regulations have since been adopted and put in practice by most of the Class I carriers of the United States, and, either in their entirety, or, in some instances, with modifications, represent the general practice of the American railroads.

The affiant says that on the New York Central Lines, employing at the present time approximately 100,000 employees, all employees directly or indirectly engaged in or having duties in connection with the transportation service, such as movement of trains, cars, and engines in road or yard service, the operations of yards, signals, crossing protection, maintenance-of-way, and car and engine inspections, are subject, under his jurisdiction and supervision, to the system of physical examinations hereinafter described. These employees, among others, including enginemen, yardmen, motormen, motormen's helpers, firemen, conductors, trainmen, brakemen, switchmen, switch tenders, yardmasters, telegraph operators, crossing watchmen, towermen, signalmen, and engine and car inspectors. All examinations are made by duly licensed surgeons. Such examinations are made in the case of all applicants for employment and in the case of all promotions and reentrance into service. Such examinations are also made periodically in the case of employees in service. In the case of all employees under 50 years of age, such examinations are made once every 3 years; in the case of employees between the ages of 50 and 55, such examinations are made every 2 years; in the case of all employees over 55 years of age such examinations are made annually; and, as to all these, such examinations are made more frequently if, in the judgment of the medical department, the physical condition of the particular employee requires more frequent examination. In all cases where employees are found physically or mentally defective for the safe, efficient, and satisfactory performance of their duties, employees are either released from active service, suspended temporarily from such active service, or placed under close medical observation and treatment, as necessity requires. In no instances where, upon such examinations, employees are found unfit for active service, are they continued therein. In many instances these periodic examinations disclose ailments in early stages, and the practice above referred to serves not only to promote efficiency in the service but, as well, affords opportunity for corrective medical or surgical treatment in the best interests of the employees involved. The affiant says that, based on his knowledge of the practice of other Class I carriers and the Pullman Company, in a general way the procedure so followed on the New York Central Lines is followed by the others, there being principally variations in the details as to frequency of examinations. The affiant denies that there are on the railroads of the United States any significant number of superannuated employees who, for the good of the service, should be retired.

For many years the affiant has made a study and a close analysis of the economic and life extension value of periodic examinations of the character above described and, on the basis of said studies, the

affiant states that in his opinion these periodic physical examinations definitely and measurably lengthen the economic life of many such employees.

WILLIAM L. HARTMAN.

Subscribed and sworn to before me this 5th day of October 1934.

[NOTARIAL SEAL] P. K. HOWARD, *Notary Public.*

My Commission expires May 24, 1935.

Plaintiffs' Exhibit 37

AFFIDAVIT

Filed October 12, 1934

STATE OF ILLINOIS,
County of Cook, ss:

CARL R. GRAY, being duly sworn, deposes and says:

I am President of the Union Pacific Railroad Company and its affiliated System companies which operate over nine thousand miles of road, extending from Omaha and Kansas City on the East, to Seattle, Portland, and Los Angeles on the Pacific Coast. I have been continuously in the railroad service since the year 1883, beginning as telegraph operator, continuing in various capacities in the traffic department until 1897, and thereafter in the operating department as Division Superintendent, Superintendent of Transportation, General Manager, Operating Vice President, and Senior Vice President of the St. Louis and San Francisco Railway, thereafter as President successively of Spokane, Portland and Seattle Railroad and Oregon Electric Railway, Great Northern Railroad and Western Maryland Railway, and Chairman of the Wheeling & Lake Erie Railroad. I served the Federal Railroad Administration as Director of the Division of Operation, and have been President of the Union Pacific Railroad and its System companies since January 1, 1920.

The Union Pacific System companies have for some thirty years maintained a pension plan for employes which has the features common to the pension plans maintained by a large number of railroad companies. The plan is voluntary and its continuance optional with the companies. Its entire cost is borne by the companies. It provides for the retirement of all officers and employes at age seventy, with pensions to those of twenty years' service, with a permissive retirement at age sixty-five in the case of train employes and a few other classes of employes in the operating department. The foregoing retirements are irrespective of incapacity. Male employes with twenty-five years' service and female employes with twenty years of service may be retired on pension for permanent disability irrespective of age. The pension allowance consists of one percent for each year of service of the average pay received for the ten years preceding retirement. The necessary continuity of service is not broken by leave of absence, suspension, dismissal followed by reinstatement within one year, temporary lay-off in reduction of force, employment in the service of the United States Railroad Administration or absence in the military or naval service of the United States

during the Spanish War or of the United States or its allies during the World War.

I am entirely familiar with the operation of the pension plan of the Union Pacific System companies and with its effects upon the relations of those companies and their employes. And in my prior service I was familiar with the operation and effect of the pension plans on other railroads of which I was President or with which I occupied a managerial position as follows: Great Northern Railway and Western Maryland Railway. It is my recollection and impression that in the origin of railroad pension plans the hope that the provision of such pensions would have a tendency to reduce strikes on the part of employes was one of the reasons for their adoption by railroad companies. However, it has been my experience, and I know that it has been the general experience of railroad managements, that plans providing pensions for employes have no deterrent effect upon strikes. When a strike question is submitted to any body of employees their vote is more influenced by the immediate advantage which they hope to realize from the demands in controversy than it is influenced by the more remote benefit of retirement on pension at some future time.

It is my experience and observation that the existence of pension plans for railroad employes does not directly increase the efficiency, diligence, or carefulness with which the employes perform their work. Such plans, however, do by their indirect operation have the effect of increasing the efficiency and safety with which railroad operations are conducted, taking the operating organization as a whole, in the following manner: The expectation of retirement on a pension as a reward for long-continued service has a tendency to induce employes to continue in the service of one railroad company and to reduce the labor turnover. It results from this, that in the whole body of employes of the company there is a larger proportion of experienced employes than would be the case in the absence of a reward for long-continued service. It results finally that the organization as a whole functions more efficiently by reason of the larger proportion of experienced employes. The extent of the influence of pension plans in reducing labor turnover in the case of any railroad company is not susceptible of proof or exact ascertainment, but it is the conviction on the part of railroad managements that pension plans have the effect aforesaid which causes such managements to continue the plan in operation and in my judgment this is the main justification for maintaining them.

I have studied the railroad retirement act and in my judgment the pension plan embodied in it would be destructive of the beneficial influence in effect as above described of the voluntary pension plans heretofore maintained. The fact that the retirement annuity is obligatory upon the employing railroads would have a tendency to lessen the incentive of employes for diligent and efficient service. The fact that the retirement annuity may be earned by service upon any number of railroads and that the service record is aggregated and need not be a continuous service with any one carrier would have no tendency to encourage continuous service in one organization or to reduce the labor turnover of any railroad company or to retain in its service a desirable proportion of experienced employes.

I understand the argument or representation has been advanced that there are now in the railroad service a large number of employees who by reason of age are no longer efficient and that thereby the efficiency and even the safety of railroad operations are reduced. I know of no basis for this assertion. Certainly the companies of which I am now President do not retain in any class of service involving the safety of transportation operations or safety of fellow employees, any men whose continued service by reason of age or other causes might be considered unsafe in the slightest degree, and I believe this to be a cardinal principle in railroad operations generally. It is certainly not true as a general rule that older employees are more inclined to carelessness or less efficient than younger employees. The contrary is true, and for those positions in railroad service which principally involve the factor of safety, managing officers place greater reliance upon the care and efficiency which becomes ingrained with the maturity and long experience of the employee.

(Signed) CARL R. GRAY.

STATE OF ILLINOIS,
County of Cook:

Subscribed and sworn to before me this 4th day of October 1934.

[SEAL] (Signed) EDWARD D. ROSENGREN,
Notary Public.

My commission expires September 26, 1936.

Plaintiffs' Exhibit 38

AFFIDAVIT

Filed October 12, 1934

STATE OF MARYLAND,
City of Baltimore, ss:

Personally appeared before the undersigned authority Daniel Willard, who, being duly sworn, says:

1. That he is now, and has been for 25 years, president of The Baltimore and Ohio Railroad Company; that his entire adult life has been spent in railroad work; first, as a maintenance-of-way employee, then locomotive fireman, shopman, engineer, trainmaster, superintendent, and on up to his present position.

2. That The Baltimore and Ohio Railroad Company, since 1884, has had a "pension" system, supported entirely by the Company, to which the employees make no contribution. Under the system an employee is eligible for retirement at the age of 65 years, but retirement at that age is not compulsory. That since the inauguration of the system, as affiant is advised and believes, there has been on the Company's pension roll, first and last, a total of 8,306 persons who have received in payments up to the present time the aggregate sum of $20,150,546.24; that the number on said pension roll at the present time is 3,776; that the payment to them at the present time is on the basis of $2,237,000.00 per annum.

3. Affiant further says that he has read what purports to be copies of affidavits of Messrs. Joseph B. Eastman, Murray W. Latimer, Otto S. Beyer, James C. Clark, and Lee M. Eddy in which, among other things, the opinion is expressed that a company pension system, such as The Baltimore and Ohio Railroad Company has, is paternalistic (whatever that may mean), and that a system whereby the Government becomes the paymaster, such as is provided in the Railroad Retirement Act, is superior to the existing pension system of the American railroads. It is affiant's belief that the pension system employed by The Baltimore and Ohio Railroad Company, which is similar in its fundamental aspects to the plans in force on many other railroads, has not only been of very great value to the employees, but has tended to stabilize employment, especially during periods when there was heavy turnover in employment generally; and that it has strengthened the loyalty of the employees to their employer, and tended to make more cordial the relations between the management and the employees, the pension regulations at all times making it possible for persons not ordinarily eligible to receive special consideration where the cases were meritorious.

4. Affiant further says that it is his opinion that under the Railroad Retirement Act, whereby the Government becomes the paymaster, the relationship created by the present voluntary system would be materially disturbed; that no longer would there be the same incentive for continued employment with any particular company; that employees looking to the Government, as they would, for their pensions, would have a lessened interest in the solvency or the efficiency of the company which employs them, and as a consequence the Act to that extent would impair the efficiency and safety of the operations of the railroads.

Affiant insists that when the owners of the property voluntarily surrender to employees millions of dollars for pensions, even over periods of years when they, the owners, have not received any return on their investment, they are entitled to the cooperation and loyalty such a sacrifice properly creates.

5. Affiant says that instead of the existing pension systems being regarded by railroad employees with suspicion, dissatisfaction, and hostility, as was stated by Mr. Beyer, his experience and observation convince him that they have been greatly appreciated on the roads with which he has been connected and during his long experience in railroad work, and during an intimate association with railroad employees, he has never known of any such feeling on the part of the employees toward these pension systems, as Mr. Beyer describes.

6. With particular reference to the alleged excess of superannuated employees on railroads in the United States, affiant believes the statements in defendants' affidavits concerning this subject are greatly exaggerated.

As to the number of such superannuated employees, affiant believes it is relatively small, and is confirmed in this view by the affidavit of Dr. Julius H. Parmelee filed in this case, a copy of which affiant has seen and to which is attached a graph showing the number of employees and their different ages. As to the men who are 65 years or

over, from affiant's knowledge of the situation on the Baltimore and Ohio Railroad and a general knowledge and observation of employees of many other railroads, affiant states that these men are usually in vigorous health and in full possession of their mental and physical faculties and thoroughly competent to perform the duties assigned them. It is the practice of the Baltimore and Ohio Railroad Company, and it is believed it is the general practice of other railroads, to give very careful attention to the condition of their employees so that there can be no question as to their competency to perform their respective duties. It is a mistake to say that there is on the railroads of the United States any considerable number of men over 65 who are not competent to perform the duties assigned them, and such a statement is a reflection upon men who are skilled, competent, and often extremely useful because of their long experience.

The seniority rules in force on railroads put in at the instance of labor, justifiable, have tended toward the retention of older men in the service. They are, as a rule, more useful to the company because of their longer experience and training, and common justice demands that they be given preference. Naturally an older man may not be as active physically as a younger one, but often this fact is more than offset by his long experience, his acquired skill, his better knowledge of the road, and the caution that comes with age.

(Signed) DANIEL WILLARD.
(Affiant)
President The Baltimore and Ohio Railroad Company,
Baltimore, Maryland.

Subscribed and sworn to before me this 5th day of October 1934.

[SEAL] (Signed) FEARLESS M. WILLIAMS,
Notary Public.

My Commission expires May 6, 1935.

Plaintiffs' Exhibit 39

AFFIDAVIT

Filed October 12, 1934

STATE OF NEW YORK,
County of New York, ss.

HALE HOLDEN, being first duly sworn, deposes and says:

That he is Chairman of Southern Pacific Company, one of the plaintiffs herein; that for approximately twenty-two years from 1907 until 1929 he was engaged in railroad service with the Chicago, Burlington & Quincy Railroad Company performing duties of General Attorney, Assistant to the President, Vice President, and for the last twelve years of such service was President of that Company; that on January 1, 1929, he became Chairman of the Executive Committee of Southern Pacific Company and in 1932 became Chairman of that Company; that during his service with Chicago, Burlington & Quincy Railroad Company he participated in and directed the establishment by that Company of a voluntary system of pensions for its employees, and that he participated in the administration of such pension plan

for a number of years and up to his retirement from the service of that Company; that Southern Pacific Company established a voluntary pension system applicable to its employees on January 1, 1903, and that since January 1, 1929, affiant has participated in the administration of that pension system; that both pension systems herein mentioned were established voluntarily by the respective companies named and are supported by such companies without contributions from employees; that affiant is also generally familiar with pension systems established and maintained by other railroad companies in the United States.

That the purposes of the pension systems of railroads in the establishment and administration of which this affiant has participated were and are, briefly, (1) to create a spirit of increased loyalty in the employees with the expectation that the quality of work performed and service rendered by the employees would be improved as a result of the establishment of such plans, and (2) to induce faithful employees to remain in the service of the employer and decrease the turnover in employment, thereby indirectly increasing the efficiency of the establishment of such plans, and (2) to induce faithful employees; that it is the opinion of affiant that the establishment and continuance of the pension systems have in substantial measure accomplished the purposes above stated; that in the establishment and maintenance of the pension systems of the railroad companies with which this affiant has been connected it was not and is not expected that such pension systems should interfere in any way with labor organizations or with the prevention of strikes, and in the opinion of affiant such pension systems have had no effect in those respects; that in the opinion of affiant said pension systems have had no effect on safety of railroad operations for the reason that employees on becoming partly or wholly incapacitated or unfit for service are not retained in hazardous positions in which the safety of employees or the public is involved, and this regardless of any age limit or pension privileges, and further this affiant states that from his experience it is his opinion that accidents on railroads have not been and are not more prevalent as a result of the acts or omissions of older employees in the service than of the acts or omissions of younger employees.

That affiant is familiar with and has carefully considered all of the provisions of the Railroad Retirement Act and that in his opinion if such Act becomes effective, it will (1) defeat the objects sought to be accomplished by existing railroad pension systems because it will tend to create and increase rather than diminish inefficiency in railroad operations, because it will tend to remove the pension plan as an incentive to loyalty in that the employees will give the employer no credit for an involuntary plan imposed by law; and (2) that instead of decreasing the employment turn-over, it will tend to increase it by making it possible for, and in fact encouraging, adventurous and restless employees to move from the service of one railroad to that of another; and (3) the involuntary pension system set up by the Railroad Retirement Act places no restraint on disloyalty, dishonesty, or inefficiency, but on the contrary tends to reward those objectionable qualities equally with qualities of good character, good behavior, prudence, efficiency, and loyalty.

That the Railroad Retirement Act places a very heavy additional financial burden upon the Southern Pacific Company for pension purposes at a time when its revenues are inadequate to meet its obligation.

(Signed) HALE HOLDEN.

Subscribed and sworn to before me this 5th day of October, 1934.

[NOTARIAL SEAL] (Signed) WARREN FAIRBROOK,
Notary Public, New York County.

Clerk's no. 5—Register's no. 5-F-58. Commission expires March 30th, 1935.

Plaintiffs' Exhibit 40.

AFFIDAVIT

Filed October 12, 1934

STATE OF ILLINOIS,
County of Cook, ss:

RALPH BUDD, being first duly sworn, deposes and says that he is a resident of Chicago, Illinois, and is President of the Chicago, Burlington & Quincy Railroad Company, one of the plaintiffs herein, hereinafter called the "Company"; that he has been President since January 1, 1932; that for thirteen years prior to said date he was President of the Great Northern Railway Company and prior thereto was Executive Vice President of the said last-named company and has spent his entire working life in the service of said company or other railroad companies; that this affidavit is made with the knowledge that it will be used in the above-entitled cause; that the Company established a voluntary pension system on January 1, 1922; that deponent has given a great deal of time and study to the operation of railroad pension systems and by reason of his intimate acquaintance with large numbers of railroad employes during his long service as a railroad officer he is familiar with the manner in which railroad employes generally perform their duties and the influences which conduce to the efficiency and safety of railroad operation.

The chief reasons, according to deponent's experience from the standpoint of a railroad company in establishing and maintaining a voluntary pension system, are as follows: it promotes and encourages continuity of service with the particular company by the employes and inspires in the employe a spirit of loyalty to the company, and to a considerable extent these results have been accomplished. A voluntary pension plan is not established for the purpose of preventing strikes or interfering with labor organizations nor has it in practice had that effect. To the extent that a voluntary pension system encourages continuity of service with a particular carrier, such a system has a tendency to promote greater efficiency in that it has a tendency to secure the greater efficiency which is naturally found with employes of mature experience in performing their duties on the particular railroad.

If the above objects are eliminated, there remains no element of a pension plan which can contribute to efficiency.—The effect of the Railroad Retirement Act, in the opinion of deponent, will be to de-

stroy rather than promote efficiency. Under the Act, employes will look to the Government for a pension and there is no incentive to remain in the service of a particular company as service on all railroads is pooled and in determining the amount of the employe's pension under the Act an employe discharged for unsatisfactory work, or even for dishonesty, will apparently at age 65 become eligible for a pension based on the number of years that he was in railroad service. Furthermore, the heavy additional financial burden placed upon the Company by the Act will reduce its ability to perform adequate and safe service to the public.

(Sgd.) RALPH BUDD.

Subscribed and sworn to before me this 4th day of October 1934.

[SEAL] (Sgd.) L. M. NOWLAN,
Notary Public.

My commission expires February 19, 1937.

Plaintiffs' Exhibit 41

AFFIDAVIT

Filed October 12, 1934

STATE OF MINNESOTA,
County of Ramsey, ss:

CHARLES DONNELLY, being first duly sworn, deposes and says that he is a resident of St. Paul, Minnesota, and is President of the Northern Pacific Railway Company, one of the plaintiffs herein, hereinafter called the "company"; that he has been President since December 1, 1920; that from October 1, 1919, to December 1, 1930, he was Executive Vice President of the company and that for many years prior thereto was a member of the Law Department of the company; that this affidavit is made with the knowledge that it will be used in the above entitled cause; that the company established a voluntary pension system on May 1, 1922; that deponent has given a great deal of time and study to the operation of this pension system and states the following facts with respect to it and the experience of the company under it:

Under the plan adopted May 1, 1922, an employee attaining the age of seventy is retired, and an employee attaining the age of sixty-five may be retired. Employees who at the date of such retirement have been twenty years continuously in service are pensioned. Employees who have been twenty-five years or more continuously in service and have become permanently incapacitated may be retired and pensioned regardless of age. Employees between sixty-one and sixty-five years of age who have been twenty years continuously in service and have become permanently incapacitated may be retired and pensioned. The basis of pension allowances is one percent of the average monthly earnings received during the ten years next preceding retirement, multiplied by the number of years of continuous service. The pension rules provide that pensions are gratuities and that the granting of the pension creates no contract.

The pension plan was established in the belief that the best interests of the company would be promoted by it in that the morale of the employees would be improved and their loyalty to the interests of the company would be promoted. It was thought that the requirement that to earn a pension continuous service for at least twenty years was necessary, would influence employees to remain in the service of the company, to do everything possible to further the business of the company and would cause employees to work for and with the management of the company. It is the opinion of deponent that in a considerable measure these results have been obtained. The pension plan was not established with the thought that it would prevent strikes, nor has it, as a matter of fact, had that effect. Neither was it thought that the establishment of a pension system would in any way interfere with labor organizations on the Northern Pacific Railroad, and the pension system has had no such effect.

That in deponent's judgment it is impossible to connect safety of operation on the Northern Pacific Railroad with its pension plan; that the experience of the company has not shown that older men cause a greater number of accidents than younger men.

That deponent has studied the Railroad Retirement Act and is of the opinion that the effect of said Act will be to destroy rather than to promote efficiency. Under the terms of the Act the employee does not look to the management for a pension but to the Government. Under the Act there is no incentive to remain in the service of the company as service on railroads is pooled in determining the amount of an employee's pension. Furthermore, under the Act, as deponent is advised it is interpreted and will be enforced by the Railroad Retirement Board, an employee discharged for unsatisfactory work or even for dishonesty, may nevertheless at age sixty-five become eligible for a pension based upon the years that he was in railroad service.

The additional burden placed upon the Company by the Act would take from the Company money that is needed for maintenance of safe and satisfactory service to the public.

CHARLES DONNELLY.

Subscribed and sworn to before me this 4th day of October 1934.

[NOTARIAL SEAL] J. M. McILRATH,
Notary Public.

My commission expires March 29, 1939.

Plaintiffs' Exhibit 42

AFFIDAVIT

Filed October 12, 1934.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

JOHN F. DEASY, being duly sworn, deposes and says that he has been in the service of The Pennsylvania Railroad Company for over 32 years, entering the service as a telegraph operator, and subse-

quently passing through the stages of clerk, agent, and supervising agent. In November 1917 he occupied the position of Assistant Freight Claim Agent, and in 1918 became Superintendent of Stations and Transfers. In 1920 he became Assistant Chief of Freight Transportation. In 1928 he was appointed Assistant Vice President in Charge of Operation. In 1931 he was appointed Vice President at Pittsburgh, Pennsylvania; and since October 16, 1933, he has been Vice President in Charge of Operation, with office in Philadelphia, Pa.

Deponent's work with this company has been such that he has been brought in immediate contact with large numbers and various classes of its employes, and while more particularly with those engaged in the Operating Department, yet also with those engaged in various departments of the company, both in offices and on the lines of the railroad. He has thus had much opportunity to ascertain not only the manner in which employes perform their duties, but the loyalty of the employes, the morale in the service and the zeal and efficiency with which the work is performed. Deponent also, in his various capacities, has had much opportunity to learn the position of the management with respect to matters of personnel and subjects related thereto, including that of pension.

On January 1, 1900, The Pennsylvania Railroad Company established its voluntary pension system, which remained in effect until August 1, 1934, when it was revised to the extent that no pensions are now authorized which would take effect after August 1, 1934. During the pendency of the plan and under the regulations, employes were retired on pension at the age of 70; and, on request, were retired on pension between the ages of 65 and 69 in the case of physical disability when coupled with a service period of 30 years. A regulation of the company limits the age for entry into the service to 45 years. The entire cost of the plan is and has been paid by the company.

In the adoption and continuance of this plan there were two reasons of more than usual force. The first was length of service. The second was the matter of loyalty. The period of service with a particular railroad company is of advantage in producing the grade of work which may properly be expected from an employe on any particular railroad. This when coupled with loyalty was one of the principal results expected from the company's pension plan; and it has not been unusual on the lines of this railroad to hear employes speak with pride, first, of being employed on The Pennsylvania, and, next, in recounting the number of years of their service.

On the contrary, the Railroad Retirement Act removes such advantages of efficiency and safety as may result from the individual company plan. Under the terms of the Act as construed by the Railroad Retirement Board, any railroad employe is entitled to a pension on reaching the age of 65, irrespective of length of service on one or more railroads. In addition, loyalty in service and efficiency in work are neither encouraged nor required. More particularly in the following respects the Retirement Act has these adverse effects: (1) it removes the personal element between employer and employe in the matter of pensions; (2) in casting the payment of pensions on the

Government, it destroys that zeal and vigor which is so much a part of loyalty to the individual employer and which has been one of the chief factors in the upbuilding of industry in this country; (3) it compels payment of pensions to an employe, whether dishonest, slothful, or inefficient, but who by such conduct has in reality destroyed any claim to pension privilege; and (4) it casts upon the carrier a financial burden without respect to ability to pay, which violates one of the cardinal rules of successful business, which is that an industry must be in position to earn the load, with due consideration to its other financial obligations, before it can rightly be asked to pay.

(Sgd.) J. F. DEASY.

Sworn to and subscribed before me this 5th day of October 1934.

[SEAL.] [Sgd.] N. SPERINO,
Notary Public.

My commission expires April 1, 1935.

Plaintiff's Exhibit 43

AFFIDAVIT

Filed October 12, 1934

DISTRICT OF COLUMBIA,
City of Washington, ss.

LAWRENCE A. DOWNS, being first duly sworn, deposes and says:

That he is President of the Illinois Central Railroad Company and its affiliated companies, the Yazoo & Mississippi Valley Railroad Company and the Gulf & Ship Island Railroad Company. He lives in Chicago. He is 62 years of age. He was educated at Purdue University, graduating from that institution in 1894 with the degree of Bachelor of Civil Engineering. In 1929 Purdue University conferred upon the affiant the degree of Doctor of Engineering.

Affiant began railroad service in 1895 with the Vandalia Railroad. In 1896 he began service with the Illinois Central as a member of an engineering party. In 1898 he was appointed Roadmaster on the Illinois Central and served in that capacity for about nine years. From 1907 to 1910 he was Assistant Chief Engineer Maintenance of Way on the Illinois Central. From 1910 to 1915 he was a Division Superintendent on the said railroad, located successively at Fort Dodge, Iowa, Dubuque, Iowa, and Louisville, Kentucky. In 1915 he was appointed General Superintendent of the southern lines of the Illinois Central with headquarters at New Orleans. In 1916 he was appointed General Superintendent of the Northern lines of the said railroad with headquarters at Chicago. In 1919 he was made Assistant General Manager of the Illinois Central System Lines with headquarters at Chicago. At the end of Federal control in 1920 he became Vice President and General Manager of the Central of Georgia Railway, affiliated with the Illinois Central, at Savannah, Georgia In 1924 he became President of the Central of Georgia Railway and also President of the Ocean Steamship Company of Savannah,

continuing in that position until 1926, when he became President of the Illinois Central System Lines, which position he now holds. He has been President of the three above-named railroads constituting the Illinois Central System since 1926, and since 1929 has been Chairman of the Board of Directors of the Central of Georgia Railway Company.

Affiant is informed that in affidavits introduced by defendants in the above-entitled cause by Joseph B. Eastman, Otto S. Beyer, Lee M. Eddy, James C. Clark and Murray W. Latimer opinions are expressed, among other things, that the experience with voluntary pension systems has been unsatsifactory; that the depression has brought to light many weaknesses and uncertainties of such voluntary systems; that the employees have regarded voluntary company systems with suspicions, skepticism and hostility; that such systems are anomalous because "paternalistic"; that they have brought about dissatisfaction among employees and have lowered morale of workers; that it is indispensible or desirable to the safe and efficient conduct of the railroad industry, and is in the public interest, that a system of compulsory retirement and pensions such as that contemplated by the Railroad Retirement Act be enforced; and in some of which affidavits the affiants undertake to state reasons which led railroad managements to establish voluntary pension systems.

There has been in existence on the Illinois Central since July 1, 1901, a railroad retirement or pension plan under which employees who have reached the age of seventy years and have been twenty-five years in service are retired and given a retirement allowance which is obtained by multiplying the average earnings for the ten years immediately prior to retirement by a percentage figure obtained by multiplying one per cent by the number of years of continuous service. The plan also provides for retirement at an earlier age than seventy years, provided there is such disability as prevents the employee from performing his regular duties, and provided he has had 25 years' continuous service with the Illinois Central System.

This retirement and pension plan was inaugurated by the Illinois Central and established entirely voluntarily and as a form of gratuity to employees who have grown old and have long been in its service. It was not established in recognition of any legal obligation or duty. The prime reasons which actuated the management of the Illinois Central in establishing the plan were: first, the thought that the establishment of such gratuity pension would contribute to the loyalty of employees on that railroad, by encouraging them to work faithfully for it and exert themselves faithfully in its best interest, in the confidence that if they did so they would not only be paid full compensation for their labors performed but would receive a pension gratuity in addition upon retirement for old age which nature inevitably causes; and, second, that the anticipation of receiving such a gratuity would influence employees to continue in its service and give it the benefit of their accumulated experience, rather than leaving it and giving the benefit of that experience to competing carriers.

It was for these two reasons, and for these alone, that the establishment of the said retirement and pension system was thought or expected to have any relation to efficiency and safety of transportation.

And based upon all his experience affiant states that it is only insofar as the said voluntary pension plan has created such loyalty and faithfulness in its employees, as contrasted with the dissatisfaction, skepticism, suspicion, lowered morale, and hostility asserted and described in the affidavits above referred to, and only insofar as said pension plan has contributed to continuity of employment with it, that said pension plan has made any possible contribution to the efficiency and safety of operation of the Illinois Central.

Affiant has carefully studied the Railroad Retirement Act and its provisions and, based upon his knowledge and railroad experience, states that the plan set up by that Act for compulsory retirement and compulsory pensions would destroy the only two elements which can make any retirement and pension plan tend to contribute to efficiency and safety of transportation, that is the elements of loyalty of employee to employer and of continuity of service of employees with the same employer. The employee would no longer feel any sense of appreciation to the employer for having conferred retirement and pension benefits on him but would rather look to the federal government as the author of such benefits. The Act would remove all incentive of employees to remain in continuous service with any one carrier, by reason of the pooling provisions which pool all service with all carriers and which would give all benefits to an employee no matter how often he changed employers. Furthermore, it would not tend to create or encourage efficiency or carefulness of employees because it confers equal benefits upon the careless and the careful, upon the disobedient and the obedient, and even upon those who are discharged for cause, as for carelessly causing wrecks, accidents, and injuries to persons or property.

And affiant accordingly states that the enforcement of the Railroad Retirement Act will tend to destroy loyalty of employee to employer, will tend to destroy continuity of service with an employer, will reward and encourage carelessness, inefficiency, disobedience, and incompetence, will seriously injure the efficiency and safety of interstate transportation, will injure interstate commerce, will impose upon interstate carriers by railroad burdens and injuries which they will be unable to bear, and will for all of the foregoing reasons seriously prevent the recovery of the national rail transportation system from the effects of the depression and will injure the interest of the public in an adequate, safe, and efficient transportation system.

LAWRENCE A. DOWNS,
(Affiant)
President Illinois Central Railroad Company and Affiliated Lines, Chicago, Illinois.

Subscribed and sworn to before me this 4th day of October 1934.

MARY T. KINNEY,
Notary Public.

My Commission expires October 3, 1938.

Plaintiff's Exhibit 44

AFFIDAVIT

Filed October 12, 1934

STATE OF NEW YORK,
County of New York, ss:

FREDERICK E. WILLIAMSON, being duly sworn, deposes and says:

That he entered railroad service more than thirty-five years ago and has continuously been engaged therein since that time, occupying successively the positions of clerk, car accountant, asst. sup't., superintendent and general superintendent of The New York Central Railroad Company, and its predecessor The New York Central & Hudson River Railroad Company until the year 1925, at which time he was appointed Operating Vice President of the Northern Pacific Railway Company; thereafter he was President of the Chicago, Burlington & Quincy Railroad Company, which position he resigned upon becoming, on January 1, 1932, President of The New York Central Railroad Company and of other companies comprising with it the so-called New York Central Lines. Since that time he has been and now is President of The New York Central Railroad Company, one of the plaintiffs in this cause, and of the other companies comprising said New York Central Lines.

The deponent is advised that there have been filed in this cause, in behalf of the defendants, affidavits of Joseph B. Eastman, Murray Latimer, and Otto S. Beyer, in which are set forth the opinions of the said persons with reference to the effect on efficiency and safety of railroad transportation of the Railroad Retirement Act, and that in the affidavits of the last two named persons there are also set forth conclusions concerning the motivating reasons for the maintenance of existing voluntary pension systems on certain railroads of the United States.

For upwards of 25 years, the deponent's railroad service has been of a supervisory nature, bringing him into constant and intimate contact with large numbers of railroad employees and affording him manifold opportunities to observe and learn the manner in which railroad employees generally perform their duties, as well as the morale of such employees and the efficiency and safety of their performance. The deponent has also had large opportunity to observe and learn the attitude of railroad management in matters of personnel, and, by reason of the positions that he has held in the past, has participated in the formulation of such attitude, and in his present position, with the advice and counsel of other officers of his companies, and by the authority of the boards of directors of said companies, he now determines that attitude so far as his companies are concerned.

For many years, the companies of which the deponent is president have maintained voluntary pension systems, the entire cost of which is assumed by said companies. Under the terms of said voluntary systems, gratuitous pensions are paid to retired employees of said

companies who have continuously been in such service for the number of years specified in the pension rules. The paramount and motivating reasons, from the standpoint of said companies in the maintenance of said voluntary pension systems, are twofold: In the first place, it is hoped that thereby there is promoted and encouraged a continuity of service with the said companies by their employees; and, in the second place, that there is inspired in said employees a spirit of loyalty to the said companies. In many respects continuity of service with a particular carrier improves the efficiency of the service that is rendered. In a sense, it may be said that large railroad companies, during the early years of the service of their employees, are making an investment in the training of said employees, in that during such early years these employees are accumulating an experience and a knowledge in the direction of more efficient service that is progressively continuous for an indefinite number of years. To the extent that a voluntary pension system encourages continuity of service with a particular carrier, such a system, from the standpoint of the carrier, has a tendency to produce the greater efficiency that is found in employees with mature experience. It is hoped, also, that the existence of such a voluntary pension system encourages that loyalty which naturally springs from an appreciation of the employer's noncontractual contribution.

If these salutary objects are eliminated, there remains no element in a pension plan which can contribute either to efficiency or safety. Not only does the Railroad Retirement Act eliminate these objects but it largely increases the financial burden. Under the Railroad Retirement Act, continuity of service with a particular carrier or with any carriers is not a condition to the grant of annuities. As construed by the defendants, it is not even requisite that the annuitant remains in carrier service until retirement age. As so construed, one may leave railroad service, at any time or at any age, and thereafter engage in other occupation or business, and upon attaining age 65 years draw down a pension for the remainder of his life. If one has served 30 years in carrier service he need not even await the attainment of age 65 years to commence the receipt of annuities if content with the reduced annuities provided in such cases. Under the Railroad Retirement Act, not only is loyalty to the employing carrier or carriers no longer a prerequisite but loyal or faithful or honest service is discarded as a prerequisite. Those who through culpable negligence cause serious accidents, those even who may be dishonest, are accorded the same treatment in the way of annuities as are the most faithful, efficient, and honest.

Based on his long experience in railroad service, and on his intimate contact with large numbers of railroad employees, and on his practical experience as a railroad employee, officer, and executive, the deponent says that in his opinion unqualifiedly the Railroad Retirement Act is not in the interest of safe or efficient railroad operations, but on the contrary tends in the opposite direction.

The deponent is advised that in the said affidavit of Otto S. Beyer is set forth the opinion of said Beyer that the Railroad Retirement Act is in the interest of railroad rehabilitation. This the deponent

emphatically denies, for the reasons above set forth, as well as for the reason that the financial burden thereby imposed, instead of being in the interest of railroad rehabilitation, will seriously retard it.

FREDERICK E. WILLIAMSON.

Subscribed and sworn to before me this 4th day of October, 1934.

[SEAL] B. H. SHEFFER, *Notary Public.*

My Commission expires March 30, 1935.

Plaintiffs' Exhibit 45

AFFIDAVIT

Filed October 12, 1934

GEO. B. ELLIOTT, the undersigned, being duly sworn, affirms and says that he is and has been for the past six years, President of the Atlantic Coast Line Railroad Company, and for the years just prior thereto was Vice President and General Counsel of said company. He is a member of the Southeastern Presidents' Conference and has been, for some time past, a member of the Advisory Committee of the Association of Railway Executives. As such, he is familiar with the general policies of the railroads operated in Southeastern territory as to the estabilshment and maintenance of pensions for their employees and the reasons therefor.

A number of the railroads in the said section provide pensions for their superannuated or injured employees on a voluntary basis. These pensions, he is advised, are gratuitous and involve no payments or contributions by the employees receiving the same upon retirement. Generally speaking, they provide for the payment of employees, upon retirement at a fixed age, of pensions, the amount of which is determined by the application of a fixed percentage for the number of years that such employees have been in the service of their company.

The Atlantic Coast Line Railroad Company was among the first, if not the first railroad in the territory in question to establish a pension system. The reasons actuating it are, generally, the reasons which underlie the payment by such other roads in said section of pensions to their employees. The pension system of said Atlantic Coast Line Railroad Company was set up "for the purpose of enabling employees of the company, who have rendered long and faithful service, to retire when they have attained an age necessitating relief from duty." Under this pension plan, pensions are granted as gratuities to all employees reaching the age of seventy who have been twenty years in the service of the company. In addition, gratuitous pensions are granted to employees who are disabled by physical injuries or impairments of health, after they attain the age of sixty-one years, provided they have been ten years in the service. The amount paid is one percent of the average compensation for the last ten years, for each year the employee has been in the service.

The object of the company in establishing this system was primarily to provide protection to the employees who had been long in its service and had reached a point where retirement was necessary,

either by reason of disability, health, or old age. The pensions were granted by the company at its own expense and without contribution from the employees for the reason that it was believed that such a gratuity would assure the loyalty of the employee to the company and its business and would enhance his interest in his work and, to the same end, it would induce the employee to remain in the service rather than go into other business or to change from one carrier to another, thereby enabling the company to retain the services of the men that it had trained in its particular service and enable it to have the benefit of the knowledge and experience of such men. These beliefs and purposes have been largely realized and the company has felt fully justified by the results obtained in the continuance of its pension plan and, in this deponent's opinion, these arrangements would ordinarily be continued indefinitely.

Deponent further states that in his opinion the provisions of the Railroad Retirement Act will not accomplish these or similar purposes but will have a distinctly harmful effect on the morale and loyalty of employees in railroad service. The present personal relation between an employer who, at his own expense, provides protection for his superannuated employees and the protected employee will be entirely disrupted. Pensions paid by the Federal Government from contributions forced from the railroads and employees, as provided in the Retirement Act, will produce no such result. Loyalty founded on such a tie will disappear. Long continuance of service because of this relationship will also largely disappear. This, because the employee will feel that his company is contributing to the fund which provides his pension, not through any interest in him but under a mandate of law.

Deponent is further of opinion and therefore asserts that the provisions of the said act will not help unemployment because a majority of men who are retired at the age of sixty-five will immediately seek employment elsewhere and the new position created by the vacancy will be offset by the new applicant for further employment.

Deponent is of opinion that this is true because of the fact that most men who attain the age of sixty-five, after thirty years of service, are not ready to stop work, if for no other reason than because they are happier and healthier when working. An industrious man wants to work and deponent's experience has been that the majority of them, upon retirement for age alone, immediately proceed to seek other occupation.

Deponent is further of opinion and asserts that provisions of the Railroad Retirement Act will not be effective in promoting safety of operation on the railroads. Experience of the company represented by deponent has been that the older men, who have been trained in the service, are usually more careful and have fewer accidents than younger men in the early days of their service. Under the system adopted by said company, where the physical capacities of employees are carefully watched and they are retired when their vision, hearing, agility, and general ability drops too much, makes the older men who are retained in the service better, from a safety standpoint, than the young men who would otherwise fill their places.

This and the foregoing opinion is based upon the experience of the company represented by deponent in the administration of its pension system, which has been in effect for the past thirty-one years.

(Signed) GEO. B. ELLIOTT.

Subscribed and sworn to before me this 5th day of October 1934.

[SEAL] (Signed) A. B. LOVE,
Notary Public.

My commission expires March 6, 1935.

Plaintiff's Exhibit 46

AFFIDAVIT

Filed October 12, 1934

STATE OF KENTUCKY,
County of Jefferson, ss:

Affiant, W. R. COLE, states that he is and has been for the past eight years President of the Louisville & Nashville Railroad Company, and for about eight years prior thereto was President of the Nashville, Chattanooga & St. Louis Railway; that he is Chairman of the Southeastern President's Conference, a member of the Southern Regional Coordinating Committee, and a member of the Advisory Committee of the Association of Railway Executives. Affiant says that he is familiar with the policy, and the reasons therefor, of the railroads operating in the southern section of the Country upon the subject of pensions, and in a general way with the policy of other American railroads in respect to this matter; and that most of the larger railroads in the southern section have pension systems, which, while differing somewhat in detail, are similar in that they are all voluntary and involve mere gratuities and no contract rights, and provide for the payment to former employees, upon their retirement, of pensions the amount of which is generally determined by the application of a fixed percentage to the number of years of their continuous service. In the case of the Louisville & Nashville Railroad Company, affiant says that one must have been in continuous service for twenty-five years before receiving a pension. Affiant says that these pension systems were established and are maintained principally for two considerations: (1) the thought that a gratuity of this sort would naturally produce in the employee a sense of gratitude that would increase his loyalty to the company and its affairs, and consequently result in a corresponding enhancement of his interest in the work and the quality of his service; (2) the belief that the prerequisite of a long and continuous period of service would tend to induce employees to remain in the service rather than to go into other businesses, or switch from one railroad to another, thereby in either case often depriving the railroad which has trained an employee of his knowledge and experience, and hence affecting to that extent the efficiency of that railroad's operation. Affiant says that the result has not always been what was desired, but that the considerations mentioned have remained sufficiently potent to justify the maintenance of these volun-

tary pension systems, and, in affiant's opinion, they will be continued indefinitely. He says the provisions of the Railroad Retirement Act, which named as one of its purposes the advancement of safety and efficiency in interstate commerce, will have an exactly opposite effect in that it will tend to injuriously affect whatever of loyalty existing plans induce, because the employee will realize that the pension which he receives under the act comes not from his employer but from the Government, and that his company is contributing to the pension fund, not by virtue of any interest it has in him but because it is forced by law to give him this bonus as his established right. He says further that continuity of service will no longer be of any special importance to the employee since he may quit at any time and may serve on as many roads as will employ him, always with the knowledge that when he becomes entitled to a pension its amount will be measured by the combined years of his railroad service regardless of where or when it is rendered. Affiant says that such a change in the relationship of railroads and their employees cannot fail to injure rather than promote efficiency, and hence to become a distinct detriment instead of a benefit to interstate commerce.

Affiant says that the Railroad Retirement Act is a further distinct injury to interstate commerce because of the great burden which it will impose in the form of an addition to the annual operating expenses of the carriers—and that at a time when nearly all of them are in desperate straits—of the huge sum of at least sixty million dollars per annum, the required 4 percent of the payroll of $1,500,000,000.

Affiant is advised that defendants have filed affidavits criticizing the carriers for the reduction of pensions during the depression. As to this he says that it was done on the Louisville & Nashville Railroad as a necessary measure comparable with all other reductions which were made on account of the depression.

(Signed) W. R. COLE.

Subscribed and sworn to before me this 4th day of October 1934.

[SEAL] (Signed) C. W. SHAFT,
Notary Public.

My Commission expires May 15, 1938.

Plaintiffs' Exhibit 47

AFFIDAVIT OF JAMES E. GORMAN

Filed October 12, 1934

STATE OF ILLINOIS,
County of Cook, ss:

JAMES E. GORMAN, being duly sworn, deposes and says:

Since June 25, 1917, he has been President of The Chicago, Rock Island and Pacific Railway Company, and now is President of said Company; and on the appointment of Trustees in Bankruptcy of said Company and its various affiliated and subsidiary corporations in reorganization proceedings under Section 77 of the Bankruptcy

Act, now pending in the United States District Court for the Northern District of Illinois, he was appointed, and now is one of the Trustees in Bankruptcy of the said Railway Company. Prior to becoming President of the said corporation, he was a vice president thereof from 1909 until his election to the presidency, except during the period from April 20, 1915, to June 25, 1917, when said Company was in receivership; and during said period he was Chief Traffic Officer for the Receivers and Receiver thereof. By reason of said experience, he is familiar with the relationship existing between said Company and its employes, and with the Pension System hereinafter described.

The Chicago, Rock Island and Pacific Railway Company has maintained a voluntary gratuitous pension system since January 1, 1910, the entire cost of which has been borne by it. Under this system, employes attaining the age of seventy are retired, and employes in the train service and certain other specified employes may be retired at the age of sixty-five. Employes who at the date of retirement by reason of age have been twenty years continuously in the service are pensioned, and those who have been twenty-five years or more continuously in the service and have become permanently incapacitated may be retired and pensioned, regardless of age. Under the Pension Rules, leave of absence, suspension, dismissal followed by reinstatement within a year, or temporary layoff on account of a reduction in force, is not considered a break in the continuity of service. The pension rolls as of the date hereof include seven hundred and sixty-six employees retired on account of age and four hundred and ten retired on account of disability. The basis of the pensions granted to retired employes is one percent of the average monthly earnings during the ten years preceding retirement, multiplied by the number of years of continuous service.

The purpose of the Rock Island pension plan has been and is to build up among the Company's employes a feeling of permanency in their employment, an enlarged interest in the Company's welfare, and a desire to remain in and devote their best efforts to the Company's service. It has been regarded as of great benefit to the Company to have in its service employees who have an incentive to stay in that service and to apply to the performance of their duties the knowledge and experience gained therefrom, rather than go into other business, or make frequent changes of employment as among railroads.

In deponent's judgment, these results have been realized in a substantial measure, and would be seriously impaired by the Railroad Retirement Act, in that under the Act the employee does not look to the management for a pension, but to the Government, and there is no incentive to remain in the service of the Company, as service in all railroads is pooled in determining eligibility for a pension.

Amounts payable under the Rock Island pension plan are charged directly to operating expenses, as authorized by law. During the receivership of the Company from 1915 to 1917, and during the current bankruptcy proceedings, all pension allowances were and are charged to operating expenses, and paid as part of the expenses of the trust estate, before the payment of any bond interest. The Railroad Re-

tirement Act will impose a substantial additional financial burden upon the Rock Island Lines, which are now in bankruptcy, because of failure to earn their fixed charges, and this additional burden placed upon the trust estate will require the use of funds which otherwise would be devoted to the maintenance of safe and satisfactory service to the public.

Deponent is unable to state that there is a direct connection between safety of operation on the Rock Island Lines and the pension plan; the experience of the Company does not show that older men cause a greater number of accidents than younger men. On the contrary, as a general rule, older men, particularly in the transportation service, are inclined to be more conservative and careful than younger men.

JAMES E. GORMAN.

Subscribed and sworn to before me this 5th day of October 1934.

[NOTORIAL SEAL.] W. J. GEDL,

Notary Public, Cook County, Ill.

Plaintiffs' Exhibit 48

AFFIDAVIT

Filed October 12, 1934

STATE OF NEW YORK,
County of New York, ss:

L. F. LOREE, being first duly sworn, according to law, deposes and says:

1. Affiant is a resident of the City, County, and State of New York, and has his office at Number Thirty-two Nassau street, in the Borough of Manhattan, in said City of New York; he is President of The Delaware and Hudson Railroad Corporation, hereinafter sometimes called the Corporation, which is one of the plaintiffs herein, and this affidavit is made for use in this proceeding.

2. Said Corporation operates a railroad extending from Wilkes Barre, in Pennsylvania, and Binghamton, in New York, to Rouses Point, in New York, near the United States-Canada international boundary, with branches in said States and in the State of Vermont, and said railroad is engaged in interstate commerce and, also, in commerce wholly within each of the States named.

3. Affiant began railroad service during the year 1877 and, after service as a general manager and Vice-President of Pennsylvania Railroad and as President of Baltimore and Ohio Railroad and Chicago, Rock Island and Pacific Railway, became President of The Delaware and Hudson Company, which then operated the railroad now operated by the Corporation, on April 10, 1907, and has been the principal executive officer of said railroad continuously since that date. In his said capacity, affiant has continuously had charge of and observed and studied the relations between said operating companies and their employees with especial regard to safety, efficiency, and economy in operation and in the public service.

4. Throughout the whole period, from 1907 to the date of the execution hereof, the corporations successively operating said railroad

have maintained a voluntary pension system and, for the twelve years last past, have also maintained a voluntary system under which the employees of said railroad may be, and are, insured against the major hazards of death, disability, accident, sickness, and unemployment, believed to be the most liberal and flexible employee insurance system in effect in this country. Said pension system is not contractual, but no employee who, within the broad provisions of said system, has become qualified for a retirement pension, in accordance therewith, has ever been denied a pension upon retirement, nor has any pension granted in pursuance thereof ever been diminished or withheld from payment during the lifetime of any such retired employee. Retirement, under said system, is not compulsory at any age, but, in practice, every such employee wishing to retire upon attaining the age of seventy years, or thereafter, has been permitted to retire with a pension based upon the whole duration of continuous service with the railroad, and every employee reaching the age of sixty-five years, or more, and incapacitated for service, has also been accorded a retirement pension. In no case is any employee continued in service after becoming inefficient by reason of age or disability. Experience has demonstrated that the older employees who elect to remain in active service, and so remain in accordance with their desires and because of confidence of the Management in their capacity, do not in any way impair safety or efficiency or economy in operation, but, on the contrary, they are among the most cautious, reliable, useful, efficient, and valuable employees in the service of said railroad.

5. One of the purposes for which said pension system was established, and is maintained, is for the specific purpose of stimulating and strengthening friendly relations between the Management and the employees, especially by promoting continuity of service and diminishing the number and frequency of voluntary separations from the service of the railroad and, to that end, to oppose and counteract, as far as practicable, influences principally originating outside of the personnel of said railroad which, at times, become very active and are planned and intended, and actually do tend, to impair and destroy the friendly and close relations between the railroad and its employees and thus limit continuity of service and threaten and diminish safety, efficiency, and economy in operation and in the public service. Said pension system has been effective in promoting said purpose and, in so operating, has indirectly but satisfactorily and in the public interest, promoted safety, efficiency, and economy.

6. Affiant has studied the general railroad pension system attempted to be provided for by the Railroad Retirement Act, in the light of his experience, as aforesaid, and is of the opinion that it has none of the merits and advantages of the voluntary pension system maintained by the Corporation, as aforesaid, but, on the contrary, would deprive said Corporation and its employees and the public of the advantages of said voluntary system, would remove the incentive to continuity of service created by said voluntary system, would encourage frequent separations from the service of said Corporation and deprive it and the public of the benefits of having in its service a corps of employees of relatively long experience and established

capacity and would therefore tend to impair safety, efficiency, and economy.

(Signed) L. F. LOREE.

Subscribed and sworn to before me this fifth day of October 1934.

[SEAL] (Signed) ALBERT T. SWOMS,
Notary Public.

Notary Public, Bronx County. Bronx County Clerk 348. New York County Clerk, 1,431. My commission expires March 30, 1935.

Plaintiffs' Exhibit 49

Filed October 12, 1934

STATE OF NEW YORK,
County of New York, ss:

GEORGE J. [illegible], being duly sworn, deposes and says:

That he resides in Summit, New Jersey, and is Vice President and General Manager of The Delaware, Lackawanna and Western Railroad Company, one of the plaintiffs in this action; that he has been in the service of said Railroad Company since 1903, having held successively the positions of Division Engineer, Chief Engineer, and Vice President and General Manager; that he has been a member of the Pension Board of said Railroad Company since January 1, 1909, when he became Chief Engineer, and has been chairman of said Pension Board since January 1, 1934, when he became Vice President and General Manager.

That during his service of twenty-five years as a member of the Pension Board, he has become familiar with the provisions of the pension system of said Railroad Company and the operation thereof, and with the pension policy of said Railroad Company and the reasons which have induced it to establish and maintain said pension system upon its railroad.

That the pension system of said Railroad Company provides for the payment of gratuitous pensions to its employees upon retirement (1) when they have attained the age of 70 years after 25 years of continuous service, or (2) when they have attained the age of 60 to 69 years after 25 years or more of continuous service, and have become incapacitated. The amount of the pension paid in each case depends upon the number of years service and the average monthly earnings for 10 years next preceding retirement. The entire expense is borne by the Railroad Company.

That said pension system was installed and has been maintained by the Railroad Company for two principal and controlling reasons, namely: (1) to foster a spirit of loyalty on the part of its employees, arising out of a sense of gratitude for gratuitous pension payments; and (2) to promote continuity of service on the part of its employees as a result of the requirement in the pension plan of continuous service for 25 years. These objects have been accomplished in a substantial degree by the present pension system. A spirit of loyalty has been developed, and employees have very generally recognized the advantages to themselves of continuous employment with the Railroad Company.

Deponent further says that under the Railroad Retirement Act these favorable conditions in his opinion will no longer prevail. The incentive to loyalty now inherent in the present pension system will be wholly lacking in the Railroad Retirement Act, since employees will know that pension benefits received by them come not from the Railroad Company as a gratuitous payment but from a government fund created by law. And continuous service with the Railroad Company will no longer be a condition upon which the payment of pension benefits depends. Employees can leave one railroad company for service with other companies, or even be discharged for inefficiency or dishonesty, without impairing their pension rights. With these factors of loyalty and continuity of service eliminated, deponent is of the opinion that the Railroad Retirement Act will not in any way promote, but on the contrary will tend to impair the efficiency and safety of operations.

GEORGE J. RAY.

Subscribed and sworn to before me this 5th day of October 1934.

[SEAL OF NOTARY] JOSEPH FIELL,
Notary Public, New York County, No. 73.

Commission expires March 30, 1935.

Plaintiffs' Exhibit 60

AFFIDAVIT

Filed October 12, 1934

M. J. GORMLEY, being first duly sworn, deposes and says:

He is the same M. J. Gormley, President of the American Railway Association, who has previously filed an affidavit in this cause, and he has the experience and qualifications shown in that affidavit. He makes the present affidavit with knowledge that it is to be used as evidence in the above-entitled cause.

Affiant has read the affidavit of Joseph B. Eastman in the above-entitled cause, wherein he says, among other things, that the experience with voluntary pension systems has been unsatisfactory; that the depression has brought to light many weaknesses and uncertainties of such voluntary systems; and that a compulsory, automatic, and uniform retirement and pension system for the whole railroad industry is, in said Eastman's opinion, desirable.

Affiant has read the affidavit of Otto S. Beyer, in which he says, among other things, that the systematic retirement of superannuated employees, substantially in keeping with the plan provided by the Railroad Retirement Act, is indispensable to the safe and efficient conduct of the railroad industry and is, therefore, in the public interest; that employees quite generally have regarded voluntary company systems with suspicion and often with hostility; that employees have struck where they had such pension systems; that such systems are anomalous because paternalistic; that the Retirement Act would be a vast improvement upon the "paternalistic" retirement schemes; and that the Retirement Act is in the interest of railroad rehabilitation.

Affiant has read the affidavit of Lee M. Eddy, in which he says,

among other things, that the period between 1921 and the passage of the Retirement Act was marked by increasing dissatisfaction of the employees with the voluntary pension plans of the carriers, particularly accentuated during the recent depression years; and that the morale of workers was lowered by the operation of the voluntary pension plans.

Affiant has read the affidavit of James C. Clark, in which he undertakes to state the reasons why railroad managements have established voluntary pension plans and asserts that the changes with respect to retirement policy that will be brought about under the Railroad Retirement Act will not lessen the benefits to be derived by the carriers, but will in fact increase such benefits.

Affiant has read the affidavit of Murray W. Latimer, in which, among other things, he purports to set out, under headings, the efforts in other countries to relieve against old-age dependency, theories for its avoidance, history of old-age pensions, employers' reasons for adoption of voluntary pension systems, alleged inadequacies of employer plans, the crisis of voluntary pension plans, and an analysis of the Railroad Retirement Act and a summary of his views.

Affiant was familiar with the inauguration of the voluntary retirement and pension system on the Chicago & North Western Railway. He was trainmaster at about the time of and following its establishment, and in that and in other capacities with the same railroad had intimate experience with the way the plan worked. He has since, in his service with the American Railway Association, as Chairman Car Service Division, and as Executive Vice President, and as President, come to have a wide general acquaintance with the presidents and other executive officers of most of the important railroads of the United States, and has had occasion to consult with them and learn their views regarding voluntary pension systems. As an officer of the American Railway Association, he has acquired a general knowledge as to the reason for the establishment of such voluntary pension systems and as to the practical operation and effect of such systems.

The prime reasons which actuated the management of the Chicago & North Western Railway, and in affiant's best knowledge the prime reasons which in general actuated the managements of other railroads, in establishing voluntary retirement pension systems, were twofold: It was believed that the establishment of such gratuity pension plans would create and foster a spirit of loyalty to the employer company among the employees, which might have a tendency to improve the quality of their service and thus contribute in some measure to the efficiency of operation of the railroad; and it was believed that such plan would encourage employees to continue in the service of the same carrier, giving it the benefit of their growing experience and skill, and that such continuity of service with the same carrier would tend to increase the efficiency of its employees and their work.

These were the only two possible reasons for the establishment of such voluntary pension systems which could have had any relation to efficiency or safety of transportation, and it is only insofar as such

systems have contributed to loyalty of employees to the carrier and to continuity of their service with the same carrier that they have in any way tended to contribute to efficiency or safety.

Affiant has given careful study and thought to the provisions of the Railroad Retirement Act. In his opinion, and based upon his knowledge and railroad experience, the plan for compulsory retirement and compulsory pensions set up in the said Act would be destructive of the only elements in existing voluntary pension plans which could possibly tend to efficiency and safety of transportation. The plan set up in the Act would wipe out any possible feeling of appreciation or loyalty on the part of employees to the employer and would transfer any such feeling of appreciation to the Federal Government.

The provisions of the Act for pooling of service with all carriers would entirely remove all incentive of employees to remain in continuous service of one carrier, would encourage their shifting employment from one carrier to another, and would reward those who had worked for many carriers equally with those who had given years of continuous and faithful service to one carrier. As defendants construe and threaten to enforce the Act, it would reward the careless and unfaithful employee equally with the careful and loyal employee, since even employees discharged because of careless or disobedient conduct, causing wrecks or other accidents, would get the same retirement and pension rights as efficient, obedient, and careful employees. It would tend to wipe out the relation of employer and employee and to make every railroad employee, in effect, the employee of all railroads considered as one industry, conferring upon him, as the gift of Congress, compulsory retirement and pension rights, based not on his relationship to a single employer, but upon his relationship to the entire industry.

The plan set up in the Retirement Act would impose upon the railroads of the United States enormous burdens which, in the opinion of the affiant, they cannot bear under present conditions of traffic and revenues.

And affiant further states, in his opinion and best judgment, that enforcement of the said Act will seriously injure interstate commerce, and will; by reason of the enormous burden it will impose upon the carriers, seriously interfere with the recovery of the rail carriers of the United States from the effects of the depression and thus will be directly contrary to the public interest.

From his contacts with railroad presidents and other executives and his knowledge of their views, affiant states that he believes that he is in this affidavit stating not only his own views, but the views of most of the railroad presidents and executive officers of railroads in the United States.

M. J. GORMLEY,
President, American Railway Association, Washington, D. C.

Subscribed and sworn to before me this 6th day of October 1934.

[SEAL] MARY T. KINNEY,
Notary Public.

My commission expires Oct. 3, 1938.

Thereupon plaintiffs closed their case.

It was thereupon stipulated of record that this will be the final hearing, by agreement of counsel, on the foregoing record.

STIPULATION

It is stipulated and agreed between the parties that the foregoing is a full and correct statement of the evidence in this cause.

This the 5th day of November, 1934.

SIDNEY S. ALDERMAN,
Of Counsel for Plaintiffs.
HAMMOND E. CHAFFETZ,
Special Assistant to the Attorney General,
Of Counsel for Defendants.

The foregoing statement of evidence is approved.

This the 5th day of November 1934.

ALFRED A. WHEAT,
Chief Justice.

Memorandum.

This action is brought by 134 Class I railroad carriers on their Receivers or Trustees in Bankruptcy, the Pullman Company, the Railway Express Agency, Inc., and the South Eastern Express Company, to test the constitutionality of the Railroad Retirement Act (Public No. 485, 73rd Congress).

The Act provides for the appointment of a Railroad Retirement Board, charged with administering and enforcing the Act, to be composed of three members appointed by the President by and with the advice and consent of the Senate. This Board and its individual members are the defendants in the case.

The Act is entitled "An Act to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes". It is set forth in full as an appendix to the bill. The relief asked is an injunction against its enforcement.

The defendants have answered the bill, but no serious issue of fact is raised by the answer. The case came on to be heard in the form of a motion for a temporary injunction but by agreement of the parties it has been treated as a final hearing upon the merits, both sides submitting evidence in the form of affidavits.

Briefly, the Act sets up a retirement and pension system for all employees of carriers subject to the Interstate Commerce Act. Retirement is made compulsory at the age of 65, but may be extended by agreement between carrier and employee for successive periods of one year until the age of 70. Every person who has been in carrier employ since within one year prior to the passage of the Act is entitled to receive the annuity upon attaining the age of 65, calculated by the application of graduated percentages of his average monthly compensation to the number of years of his service not exceeding thirty. Employees completing thirty years of service may retire before the age of 65, but annuities payable prior to the age of 65 are reduced by 1/12 thereof for each year that the employee is below the

age of 65, except where the retirement is due to physical or mental inability to continue in the service. To provide funds for the payment of the annuities which are to continue during the lifetime of the annuitants, and the administration expenses of the Act, carriers and their employees are required to contribute to the retirement fund, the employees contributing at the present time 2% of their compensation and the carriers twice the amount of the employees' contributions. The Retirement Board is given authority if, as, and when necessary to increase the percentage fixed in the Act, without, however, altering the ratio between employee and carrier contributions. The carriers are required to deduct the contributions of their employees from their compensation and to pay the sums so deducted, together with their own contributions, quarterly into the United States Treasury, the first contributions being payable on November 1, 1934, and the first annuities under the Act being payable after February 1, 1935. Official representatives of employee organizations who are former carrier employees are given the option of becoming beneficiaries under the Act by contributing to the retirement fund both the employee and the carrier contributions.

Both sides seem to agree that the only source of power in Congress to pass such an Act is the Interstate Commerce Clause of the Constitution. The plaintiffs claim in a broad way that the Act is not a regulation of interstate commerce and in addition point out certain provisions of the Act which they claim invalidate it because they are not regulative of interstate commerce or are arbitrary, unreasonable, capricious, and confiscatory, and amount to a taking of their property without due process of law.

In this memorandum I have merely outlined my conclusions without taking the time which would be necessary for an elaborate discussion, for I realize the importance to all of an immediate decision.

I am not prepared to say that the enactment of a statute providing for the compulsory retirement at a certain age of employees of railroads engaged in interstate commerce, together with provisions for the pensioning of employees so retired is beyond the power of Congress under the interstate commerce clause of the Constitution. Congress has power to regulate the relation of master and servant between interstate carriers and such of their employees as are actually engaged in interstate commerce. The fact that so many of the plaintiff carriers have for many years maintained voluntary retirement and pension systems furnishes persuasive evidence of their belief that such systems tend to promote the efficiency of their personnel by stimulating loyalty, encouraging continuity of employment with resulting security for old age, and thus increasing the morale of those in the organization. It is argued, however, that the features of the voluntary pension systems which tend to promote these desirable ends not only are absent from the retirement Act but, that it contains other provisions wholly subversive of those ends. It is said that the Act being mandatory upon the carrier relieves the employee of any feeling of gratitude of loyalty which naturally is felt toward a benefactor; that it does not promote continuity of service because the benefits of the Act do not depend upon any length of service in any particular employment or by any particular em-

ployer; so that there is no incentive for an employee to remain continuously in the service of any particular carrier; that the right to receive the annuity in no way depends upon efficient and faithful performance of duty, and that the benefits of the Act are shared equally by all employees, even those discharged for cause.

These matters, however, seem to me to involve questions of wisdom and propriety rather than of power and to be for the consideration of the Congress rather than of the courts.

When the Act is examined in detail, however, I find it contains provisions which, in my opinion, were beyond the power of Congress and which render it unconstitutional.

In the first place, the Act is unconstitutional because it extends its provisions to persons not engaged in interstate commerce.

The Retirement Act confers its benefits upon all employees of any company to which it relates without regard to distinction between interstate commerce, intrastate commerce, or activities which do not constitute commerce at all.

It was held in the Employers' Liability cases, 207 U. S. 463, that one who engages in interstate commerce does not submit all his business concerns to the regulating power of Congress and that an attempt on the part of Congress to extend its regulatory powers to all employees of an interstate carrier regardless of their duties and the work performed by them made the Act invalid. The present Act applies to all employees of the plaintiffs. Indeed there is no claim that it does not. It appears from the record in this case that some 200,000, approximately ⅕ of all the employees of the plaintiffs, do not work in interstate commerce or in work so closely connected therewith as to be a part thereof. Among these men may be mentioned mechanical employees; executive and general officers and their staffs, not including the operating vice presidents and their staffs; those engaged in accounting not having a direct relationship to interstate transportation; those engaged in the construction of buildings or the construction of new equipment; those who devote themselves to finances, custody and administration of funds or corporate proceedings and records; those engaged exclusively in work relating to real estate taxes and titles, in the management, operation, care and protection of buildings or lands not devoted to or used in connection with transportation and men employed in coal mines. As to some of these men, there may be room for differences of opinion as to their proper classification, but it is plain that there are many who are not in any real sense engaged in interstate commerce.

The proof shows that the Long Island Railroad Company, whose lines are wholly within the State of New York, the Illinois Central Railroad, and the New York Central Railroad have a large number of employees engaged solely in intrastate service. It appears that the New York, New Haven & Hartford Railroad has physical property of the value of more than $7,000,000 which the Interstate Commerce Commission has classified as noncarrier. The New York Central has property in excess of $43,000,000 so classified. The Pennsylvania Railroad Company has $17,000,000, and the Union Pacific, $19,000,000. The employees engaged in work in connection with this property are included as beneficiaries of the Act.

It seems to me that Congress exceeded its power to regulate interstate commerce, when it attempted to make all employees of the plaintiffs beneficiaries under this Act, making no distinction between those engaged in interstate commerce and those not so engaged.

Section 1 of the Act includes as employees entitled to its benefits everyone who has been in such service within one year before the enactment thereof. The evidence discloses that about 143,000 men left the service of the railroads during that year and were not in such service on the date of enactment, and that of this number approximately 80,000 probably will not return to the railroad service. Some of these men were dismissed for the good of the service. I can see no reasonable relation between giving these men the benefits of the Act and the regulation of Interstate Commerce.

Furthermore, the Act provides annuities for all persons who, at the time of its enactment, were, or within the period of one year before its enactment had been, in carrier service and who had attained, or thereafter should attain, the age of 65 years, or had completed or thereafter should complete 30 years of such service. The right to the annuities is not dependent upon the rendition of service subsequent to enactment and the computation of the annuities is not confined to service rendered subsequent but includes service rendered prior thereto.

The defendant Latimer, in his affidavit, shows that upon the assumption of the retirement at 65 of such of the present employees of the carriers as, on an expectancy basis, survive to that age, the gross annuities required by the statute to be paid to them for service rendered prior to the enactment of the law will amount in the aggregate to over four billion dollars.

The statute provides that upon the reemployment hereafter by any carrier of any man previously in railroad service all of his prior service is to be counted as part of the service entitling him to the annuity. The evidence tended to show that there are today over a million persons with that possibility.

To require the plaintiffs to contribute huge sums of money to be devoted to the payment of pensions or annuities based upon services long since completed and fully paid for seems to me to take their property without due process of law.

I am constrained, therefore, to hold that the Act is unconstitutional.

The natural reluctance which a judge feels when compelled to hold an act of Congress unconstitutional is, in this case, somewhat tempered by the fact that the Act seems not to be satisfactory even to some who favor it in principle and purpose. When the President gave his approval, he made a statement explaining his action, in which he said, among other things:

"Decision on this bill has been difficult."

He gave as among the "principal arguments against the measure":

"(a) The Federal Coordinator of Transportation, at much public expense, is now engaged in a thorough survey of the whole subject of employment security on railroads. He requested many months ago that legislation be deferred until the completion of these studies and the filing of his report.

"(b) The bill, although much improved in its final form, is still crudely drawn and will require many changes and amendments at the next session of Congress."

A decree will be made in favor of the plaintiffs, granting the relief prayed for in the bill.

ALFRED A. WHEAT,
Chief Justice.

OCTOBER 24, 1934.

Findings of facts and conclusions of law

Filed October 30, 1934

Plaintiffs request the Court, upon the entire record in this cause and upon all the evidence taken at the final hearing thereof, and in compliance with Equity Rule 70½, to make the following Special Findings of Facts, and to make and state separately the following Conclusions of Law upon such facts, to wit:

SPECIAL FINDINGS OF FACT

The Court, upon the whole record and all the evidence, in compliance with Equity Rule 70½, finds specially the following facts:

1. Plaintiffs named and listed in Article I of the bill of complaint are 134 of the Class I carriers by railroad, or receivers or trustees in possession and operation of the business of such carriers, one sleeping-car company, and two express companies, 137 plaintiffs in all, each being a carrier by railroad subject to the Interstate Commerce Act, and each of them being a carrier as defined by the Act of Congress approved June 27, 1934, entitled "An Act to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes" (Public, No. 485, 73rd Congress; S. 3231), therein designated the Railroad Retirement Act and hereinafter referred to as the Act. The respective citizenship and residence of plaintiffs is as alleged in Article I of the bill of complaint. (Found. A. A.W.)

2. Defendants are individuals and members of and constitute the Railroad Retirement Board, created and provided for in the Act as an independent agency in the executive branch of the Government, with its principal office in the District of Columbia, and as such members were appointed by the President of the United States acting under the provisions of said Act, defendant, Murray W. Latimer, being Chairman of said Board. Each defendant is a citizen of the United States and the official residence of each is and each of them is found in the District of Columbia. (Found. A. A. W.)

3. Plaintiffs have a common interest in the subject of this suit and in obtaining the relief herein sought, in that all of them are subject in substantially the same way to the operation of the Act. Their interests are common in the further particulars that they are all required by the Act to contribute to a common "railroad retirement fund" and that the "service period" of each employee, upon which the annuities provided by the Act are based, is not confined to his

service for a single carrier, but includes and accumulates his service for all carriers. Unless plaintiffs had all joined in this common suit it would have been necessary that each of them bring a separate suit for the determination and protection of his rights, thus resulting in a multiplicity of suits. The promotion of the convenient administration of justice and the prevention of a multiplicity of suits justified and required that all the plaintiffs unite their causes of action and join in this single suit. (Found. A. W. W.)

4. This is a suit of a civil nature wherein the matter in controversy exceeds, as to each plaintiff, the sum or value of three thousand dollars exclusive of interest and costs. The suit arises under the Constitution and laws of the United States, the plaintiffs asserting that the Act is unconstitutional and the defendants asserting that the Act is constitutional. (Found. A. W. W.)

5. Class I carriers are those, as classified by the Interstate Commerce Commission, having annual gross revenues of one million dollars or over. There are 151 Class I carriers subject to the Interstate Commerce Act and subject to the Railroad Retirement Act. There are over 700 carriers of all classes subject to said Acts. For the calendar year 1932 there were an average number of employees of all carriers by railroad of 1,052,000, receiving total annual compensation of $1,535,066,000 out of total operating revenues of all such carriers of $3,168,537,000. (Found. A. A. W.)

6. Of the foregoing totals, the 151 Class I carriers had 98.07 percent, and the 134 Class I carriers who are plaintiffs in this suit had 97.3 percent, of all railroad employees; the 151 Class I carriers paid 98.55 percent, and the 134 plaintiffs paid 97.9 percent, of the total compensation paid to all employees of all carriers; and the 151 Class I carriers had 98.68 percent, and the 134 plaintiffs had 98 percent of the total operating revenues of all carriers. (Found. A. W. W.)

7. The numbers of employees vary from time to time, but it is sufficient for the issues in this suit that there are approximately one million railroad employees in service and subject to the Act, of whom about 97 percent are employees of plaintiffs herein, and that the plaintiffs have about 98 percent of the total operating revenues of all carriers and pay about 98 percent of the total compensation of all railroad employees subject to the Act. (Found. A. W. W.)

8. There are something over one million additional persons in the United States who formerly were, but are not now and were not at the time the Act was passed or at any time within the year June 27, 1933, to June 27, 1934, employees of carriers and who, under the terms of the Act would, in case of their employment after August 1, 1934, by any carrier subject to the Act, come under its provisions for compulsory pensions payable out of the retirement fund, based upon their "service period" as calculated upon their entire past service with any and all former carrier employers. (Found. A. A. W.)

9. Only a part of the businesses of the plaintiffs is interstate transportation. At all times a substantial proportion of the total number of employees of each plaintiff consists of employees whose work is exclusively confined to duties in connection with other phases of the business and having no connection with interstate transportation. Of all employees of plaintiffs receiving pay during the month of May 1934, the last convenient month prior to the final hearing for

which figures could be compiled, 211,107 employees, or nearly one-fifth of the total, were employees whose work and duties were not in interstate commerce or transportation but were exclusively confined to other phases of the businesses of plaintiffs. These 211,107 employees fell under the following classes of employment (Found. A. A. W.):

1. Executive and general officers and their staffs, excluding all those in the operating departments whose duties were connected with transportation 6,779
2. Employees whose duties were exclusively confined to finances, the receipt, care, custody, and disbursement of moneys, or the custody and administration of securities owned and held by the companies 3,063
3. Employees whose duties were exclusively confined to the keeping and handling of corporate proceedings and records 302
4. Employees whose duties were exclusively confined to real estate not devoted to transportation and to the handling of taxes and land titles 1,179
5. Employees whose duties were exclusively confined to scientific experimentation and research, such as testing of materials not incorporated into operating properties or devoted to transportation service 658
6. Employees in the law and claims departments whose duties were confined exclusively to the handling of legal matters, rendering of opinions, and settlement and litigation of claims 5,051
7. Employees whose duties were exclusively confined to auditing, accounting, and bookkeeping of the books, records, and accounts of the companies 30,198
8. Employees whose duties were exclusively confined to advertising and industrial development, the securing and aiding of the location of industries on the lines of their companies 11,146
9. Employees whose duties were exclusively confined to the management, operation, care, or protection of buildings or lands not devoted to or used in connection with transportation 3,020
10. Employees whose duties were exclusively confined to the construction of buildings or of new lines of railroad not yet devoted to transportation service 9,576
11. Employees whose duties were exclusively confined to the construction of new equipment not yet devoted to transportation service 2,984
12. Employees whose duties were exclusively confined to reconstruction or major repair of equipment withdrawn from transportation service, excluding all those engaged in light or running repairs equipment still in service, and also excluding all those who work interchangeably on major repairs and on running repairs 86,493
13. Foremen and laborers in stores, reclamation, and timber-treating plants, whose duties were exclusively confined to care and custody of materials and supplies not yet incorporated in operating properties and not yet devoted to transportation service, to the reclaiming and handling of scrap and outworn materials withdrawn from transportation service, and to the creosoting and treating of timber not yet incorporated in operating properties or devoted to transportation service 17,476
14. Storekeepers, sales agents, and buyers, whose duties were exclusively confined to keeping, purchasing, selection, and testing of materials and supplies not yet incorporated into operating properties or devoted to transportation or to the sale or disposition of scrap or materials withdrawn from such service 7,604
15. Pumping-equipment operators and water tenders, whose duties were exclusively confined to the storing and keeping of supplies of water not yet delivered to operating equipment, excluding all those engaged in delivering water to operating equipment; stationery engineers and firemen exclusively engaged in heating buildings; oilers exclusively engaged in oiling machinery not de-

voted to transportation service; and coal passers exclusively engaged in storing coal not yet delivered to operating equipment, excluding all those actually delivering coal to operating equipment	6,923
16. Other employees having no duties in connection with interstate transportation or commerce	10,562
Total	211,107

(Found. A. A. W.)

10. The amount of wages paid the 211,107 employees referred to in finding 9 is not less than $300,000,000 annually. (Found. A. A. W.)

11. Certain of the plaintiffs have as a substantial part of their railroad operations particular services exclusively in intrastate commerce and have employees whose duties, although transportation or operation duties, are exclusively confined to such intrastate services, and in no way connected with any interstate transportation. A substantial number of such employees have been exclusively engaged in such intrastate commerce and transportation services throughout the entire period of their railroad service. (Found. A. A. W.)

12. Some of the plaintiffs, and in particular the Norfolk & Western and the Chesapeake & Ohio, as a part of their general business, but entirely separate from their interstate commerce and transportation business, carry on extensive coal-mining operations exclusively within particular states. Those two plaintiffs alone have a total of 1,216 employees, paid a total of over $1,300,000 in salaries and wages, whose duties are exclusively confined to the mining and production of coal ~~within individual~~ states. (Found. A. A. W.)

13. Practically all the plaintiffs, in addition to their carrier and transportation business, have other business, such as ownership and holding of lands and properties not devoted to transportation, renting of such properties, ownership and holding of stocks and bonds of other companies, receive substantial revenues from such businesses, and as a whole group the plaintiffs have many millions of dollars of investments in properties in no way devoted to railroad operation or used in the transportation service of the public. A substantial number of employees are exclusively engaged in handling such properties and businesses of the plaintiffs. (Found. A. A. W.)

14. There are not less than 2,562 employees of various railway associations, bureaus of information, bureaus of economies, tariff bureaus, and other like bureaus and associations, owned and controlled by carriers, but which are entirely separate organizations, having no functions in connection with transportation or commerce by railroad, their employees being not employees of carriers but of such associations and bureaus, and whose duties are exclusively confined to the work of such bureaus and associations, but who come within the definition of "employees" and come within the benefits of the Act. (Found. A. A. W.)

15. There are now in the employ of plaintiffs not less than 12,696 employees, other than those in official positions, who are 70 years of age or over and whom Section 4 of the Act will require to retire from the service of plaintiffs permanently on February 1, 1935. They will contribute a total of approximately $266,616 to the retirement fund but will receive therefrom in annuities based on service prior to the enactment of the Act, except for the six months between August 1,

1934, and February 1, 1935, not less than $9,500,000 the first year and not less than $78,000,000 to termination of their annuities. (Found. A. A. W.)

16. There were on August 1, 1934, the effective date of the Act, not less than 10,354 employees of plaintiffs, other than those in official positions, who were then 70 years of age or over and whom Section 4 of the Act will require to retire from the service of plaintiffs permanently on February 1, 1935. They will contribute a total of approximately $217,434 to the retirement fund but will receive therefrom in annuities based on service prior to the enactment of the Act not less than $7,800,000 the first year and not less than $64,000,000 to termination of their annuities. (Found. A. A. W.)

17. Within one year before the approval of the Act more than 146,000 of plaintiffs' employees, other than those removed by death, left carrier service and have not returned. A large number of those are permanently separated from carrier service. Of the total, not less than 8,065 were discharged for cause, not less than 21,158 voluntarily resigned or left service to engage in other employments, not less than 5,066 retired on account of age or disability, not less than 19,786 left service because they had been employed only temporarily for temporary work and the work was completed, not less than 167 left service because of the abolishment of the positions in which they had worked, not less than 5,512 left service because of consolidations of forces abolishing positions, not less than 2,645 were seasonal laborers with whom the carriers lost all contact when the seasonal work was finished, and not less than 95 left service because they had worked as apprentices and upon completion of apprenticeship there was no position open for them. The more than 146,000 such persons were not, at the time the Act was approved, and have not since been, employees of any carrier or connected in any way with any business conducted by the carriers. (Found. A. A. W.)

18. During the calendar year 1933 there was a total of 6,806 employees of Class I carriers dismissed or discharged from carrier service for cause ~~and because of their services were found detrimental to the efficiency or safety of the business of the carriers~~ and in the ordinary conduct of their businesses the plaintiffs so discharge or dismiss for cause not less than 5,000 employees each year. (Found. A. A. W.

19. The employment relation between each plaintiff and each person in its employ consists of a contract of employment ~~freely and fairly made,~~ by which the work to be done and the compensation to be paid therefor were agreed upon and fixed, and by which the employer is required to pay such wages or compensation and no more. Each plaintiff has paid and continues to pay in full when due all wages so agreed upon. Each plaintiff will be required by the Act to pay in addition into the retirement fund for annuities to such employees many thousands of dollars annually in the case of each plaintiff, and for all the plaintiffs it will aggregate not less than $60,000,000 for the first year based upon present pay rolls of carriers and the 4-percent rate of carrier contribution fixed by the Act. At the rates fixed in the Act, 2-percent employee contributions and 4-percent carrier contributions, a total of at least approximately $90,000,000 will be paid into the fund the first year, and if that amount of contribution continues

annually without increase the drain on the fund for payment of pensions will be so large and increasingly larger that the fund will be insolvent by the year 1942, showing an accumulated deficit by the end of that year of over $11,000,000. To keep the fund in operation to perform the purposes of the Act, it will be necessary for the Board to increase the percentages of contributions, as authorized by the Act, and thus the carrier contributions will necessarily have to increase greatly above $60,000,000 a year. (Found. A. A. W.)

20. The employees of plaintiffs have no peculiarity of age, physical or mental condition, or other characteristic distinguishing them from members of society generally. Plaintiffs have no higher percentage of employees 65 years of age or over than other heavy industries in general. The percentage for plaintiffs is less than for industry in general and is less than the percentage for all persons gainfully employed in the United States. Based on an undisputed study of employment on 129 Class I carriers, made in 1932 and used and relied on by both plaintiffs and defendants, which study covered 1,215,897 employees, 4.3 percent were 65 or over, 95.7 percent being under 65, and 1.2 percent were 70 or over, 98.8 percent being under 70. The 1930 census shows 4.52 percent of all males and females gainfully employed in the United States to be 65 or over and 5.09 percent of the males. (Found. A. A. W.)

21. Each of the plaintiffs now has and probably always will have a large number of employees who have a service period of more than 30 years and are between 51 and 65 years of age and who are competent to continue in efficient service. The aggregate number of employees between 51 and 65 and who have 30 years' service period is not less than 100,000. It is to the interest of the service of plaintiffs and is to the interest of the public that those such employees who are competent and efficient be retained in carrier service for the benefit of their skill and experience. (Found. A. A. W.)

22. Each of the plaintiffs has in its employ a large number of executives, official, expert, and professional employees, who possess valuable special knowledge and qualifications as the result of their many years of study and practical experience. Many of these continue in good health and full possession of their faculties and continue to be able and competent to perform entirely efficient services long after they have passed 70 years of age. ~~The training and experience of such employees is of much value to plaintiffs and to the railroad service.~~ (Found. A. A. W.)

23. Plaintiffs are separate corporate entities. Each has its own employees, entirely separate and distinct from the employees of the others. (Found. A. A. W.)

24. Fifty-six of the plaintiffs have no employees 70 years of age or over. The 12,696 such employees referred to in finding 15 are all employees of only 81 of the plaintiffs. The 56 plaintiffs which have no 70-year men have 62.9 percent of the employees and pay rolls of all plaintiffs, while the 81 plaintiffs which have such employees have 37.1 percent of the employees and pay rolls of all plaintiffs. The aggregate amounts of annuities which will be paid to 70-year old, as shown in finding 15, of not less than $9,500,000 the first year and of not less than $78,000,000 to termination of annui-

ties, will be paid out of the retirement fund, two-thirds of which will be contributed by the carriers, and approximately 62.9 percent of the two-thirds of these annuities, or $3,983,666 the first year and $32,708,000 to the end of annuities, will be contributed by the 56 of the plaintiffs which themselves have no employees 70 years of age or over. (Found. A. A. W.)

~~25. There is a wide variance among different carriers in percentage and number of employees of other age classifications and a wide variance in respect to the past service periods of their respective employees. The contribution of each plaintiff to the fund will not depend upon the age characterization or service periods of its own employees but upon the fortuitous facts in these respects concerning the employees of all carriers.~~

26. In the ordinary course of railroad business a number of carriers cease operation each year. One hundred and eighty-four short-line railroads went out of existence altogether during the past 13 years. Since June 27, 1933, 25 more went out of existence. The employees of all these nonexistent carriers share in the benefits of the Act on the basis of all prior service and remain a charge upon the remaining carriers who have never been their employers, through the retirement fund to which the remaining carriers are required to contribute. (Found. A. A. W.)

27. There are not less than 1,500 whole time officers or other official representatives of railway labor unions, over 10,000 whole and part time. Those who are whole time in the employment of labor unions are not employees of the carriers or any of them in fact, though made so by the Act. Their average age is greater than the average age of employees of carriers, their service for carriers will be pooled with their service for labor unions as basis for annuities, their annuity benefit will be higher in relation to age and contributions than in the case of carrier employees, they have the right to elect or not to come under the Act, and ~~they will~~ *may* constitute a substantial burden on the fund and on the carrier and carrier employee contributions. (Found. A. A. W.)

28. Practically all of the persons in the employ of each of the plaintiffs at the time of the approval of the Act were in the employ of such plaintiff or of other carriers at times and for periods prior to the approval of the Act. Such prior service in ~~most~~ *many* cases embraces many years. Such prior employments and services are, and at the time of the approval of the Act were, closed and completed transactions. Upon established actuarial principles, the gross amount of so much of annuities as is based on and measured by periods of service performed prior to the date of approval of the Act, required by the Act to be paid to such of said persons as shall survive to age 65 years, or are now that age or over, upon the assumption of retirement with annuities at age 65 or on February 1, 1935, if then that age or over, will be the sum of $4,415,949,000. Such portions of annuities related to service prior to the date of approval of the Act, payable in the year 1935, will amount to the sum of $68,749,000 and the amounts similarly related to prior service will steadily increase year by year in succeeding years until the year 1953, when the amount payable in that year will amount to the sum

of $137,435,000. The present worth of two-thirds of said gross amount, computed on a basis of interest at the rate of 3 percent per annum, compounded annually, is the sum of $1,720,000,000. None of the foregoing amounts includes any portions of annuities measured by or related to services rendered subsequent to June 27, 1934, the date of approval of the Act. (Found. A. A. W.)

29. The railroads of the United States, including plaintiffs, have suffered greatly by reason of the general business depression. There are now 42,751 miles of railroad in the hands of receivers or trustees in bankruptcy. Twenty-three railroads are represented by receivers or trustees in bankruptcy as plaintiffs in this cause. More railroad mileage is now in receivership or bankruptcy courts than at any time in history, more even than in the depression of the early nineties. Fifty-five Class I railroads of the United States failed to earn operating expenses and taxes during the calender year 1932; thirty-four failed to earn operating expenses and taxes in 1933; and thirty-three failed to earn operating expenses and taxes in the first six months of 1934. The value of properties of Class I railroads devoted to transportation, as found by the Interstate Commerce Commission, brought down to the end of the year 1932, was $22,074,000,000, and the net railway operating income of said Class I railroads for the year 1932 was approximately 1.48 percent of said value. Such value so determined for the year 1933 was $21,800,000,000, and the net railway operating income for that year was approximately 2.18 percent of said value. Even these low earnings were possible only through drastic retrenchment in expenditures and the exercise of the utmost economy consistent with safety. (Found. A. A. W.)

30. Effective July 1, 1934, January 1, 1935, and April 1, 1935, wage reductions theretofore in force by agreement between the Class I carriers and their employees, rendered necessary by the existing depression in industry, including transportation, were restored. Such restorations will increase the annual labor cost of Class I carriers by more than $165,000,000. There has been and will be a further increase in operating cost due to the increased and increasing prices of materials and supplies. ~~Such increase for the year 1934 compared with the lower price levels of 1933 will be approximately $125,000,000.~~ The net railway operating income of Class I carriers for the entire year 1934, based on the results for the first six months, and allowing for those increases in labor costs and costs of materials and supplies, will be substantially less than for 1933. ~~Approximately 20 percent of all the commercial freight traffic and approximately 35 percent of all the commercial passenger traffic in the United States is now conducted by motor carriers or water carriers or other competing agencies, and practically all freight and passenger traffic, except certain heavy freight moving in car lots, is the subject of active competition among the various forms of transportation. By reason of these competitive conditions it is impossible for plaintiffs to obtain through increased rates or increased volume of traffic sufficient additional revenue to meet the contributions required by the Act in addition to the other increases in operating expenses.~~ The railroad industry meets with keen competition from motor and water carriers and other competing agencies with respect to certain portions of its business. (Found. A. A. W.)

31. There was no emergency in the efficiency or safety of transportation or in the relations of railroads to labor to call for any emergency exercise of powers in enacting the Act, which indeed has no characteristics of emergency legislation. Railroads were, when the Act was enacted, and are now, operated efficiently and safely and more efficiently and much more safely than at any time in history. Railroads and railroad labor were at peace. National agreement for the gradual restoration of the ten percent voluntary wage cut, which the employees had previously accepted because of the depression, had just been satisfactorily concluded between the railroads and their employees, with the active cooperation of the President of the United States and of the Coordinator, about two months before Congress passed the Act. ~~The railroads and the employees were publicly commended by the President upon their satisfactory settlement of their differences and the relations between the railroads and their employees were as cordial, perhaps more cordial, than at any time in the past.~~ (Found. A. A. W.)

32. Railroads employing approximately 90 percent of the railroad employees had already in effect voluntary retirement and pension systems, differing among themselves in details, but in general providing for retirement at about age 70, and all providing for pensions wholly paid by the carrier, with no contribution by employees, based upon continuous service with the paying carrier. These systems were established for two principal reasons, to encourage loyalty of employee to particular employer, and to encourage continuity of service with the particular employer, thus contributing indirectly to efficiency of the employee's work. The compulsory system set up in the Act would be destructive of these two elements of loyalty and continuity of service. (Found. A. A. W.)

CONCLUSIONS OF LAW

The Court, upon the foregoing special findings of fact, makes the following conclusions of law:

1. The Railroad Retirement Act is unconstitutional because it makes as its beneficiaries all employees without regard to distinction between those engaged in interstate commerce, those engaged in intrastate commerce, and those engaged in activities which do not constitute commerce at all.

2. The Act is unconstitutional because it requires the plaintiffs to contribute large sums of money to a fund to be devoted to the payment of pensions or annuities based upon services long since completed and fully paid for.

3. The provision of the Act is unconstitutional which includes as employees and entitled to its benefits all those who have left the service of the plaintiffs within one year prior to its enactment. If this were the only unconstitutional provision, it could be treated as separable without impairing the validity of the remainder of the Act.

4. The provisions of the Act, with the exception of that mentioned in the preceding conclusion, are inseparable and it is impossible for the Court by construction to eliminate the other unconstitutional features without destroying the entire scheme and purpose of the Act.

5. The Act in its entirety is unconstitutional and by its enforce-

ment the plaintiffs and each of them would be irreparably injured.

6. The plaintiffs are entitled to a judgment for the relief demanded in the bill.

ALFRED A. WHEAT,
Chief Justice.

OCTOBER 30, 1934.

Plaintiffs' requests for conclusions of law

The conclusions of law entered by the Court were not those requested in plaintiffs' requests for conclusions of law but were independently formulated and entered by the Court, plaintiffs' requests for conclusions as filed with the Court having been as follows:

CONCLUSIONS OF LAW

The Court, upon the foregoing special findings of fact, states separately its following conclusions of law:

1. Plaintiffs and each of them will be irreparably injured if injunction as prayed is not granted.

2. The real end and aim of the Act is not to promote efficiency and safety of interstate transportation but is to provide relief for old employees and relief for unemployment, to make possible greater employment opportunities and more rapid advancement of younger employees in the service of the carriers. The Act is unconstitutional because its real end and aim is not within any power delegated to Congress by the Constitution.

3. The Act is not a regulation of commerce, within the power granted Congress by the commerce clause of the Constitution, but is an attempt to regulate matters not delegated to the federal power, and hence is unconstitutional.

4. The Act is unconstitutional because it is beyond the powers of Congress to enact under the commerce clause, in that its provisions have no reasonable relation to the promotion of efficiency or safety of interstate transportation.

5. The Act is unconstitutional because its provisions are unreasonable and arbitrary as means to any legitimate end of regulation of commerce among the states under the commerce clause power.

6. The Act is unconstitutional and in excess of the powers delegated to Congress by the Constitution, because it applies to all employees of plaintiffs alike, including those not engaged in any commerce, those engaged exclusively in intrastate commerce, and those not engaged in interstate commerce or in work so closely related thereto as to warrant regulation under the commerce clause.

7. The Act is unconstitutional, and beyond the powers of Congress under the Constitution, in that it includes as employees under its provisions certain persons not employees of plaintiffs or of any carrier, and imposes irreparable burdens and injuries on plaintiffs for the benefit of such persons who are not employees.

8. The Act is unconstitutional and beyond the power of Congress in that it violates the plaintiffs' liberty of contract, in violation of the Fifth Amendment, by fixing, changing, regulating, and increasing the wages and compensation paid by plaintiffs to their employees

for services rendered, when such wages and compensation are already fixed by contracts entered into between plaintiffs and their employees, acting freely and within the liberty to contract guaranteed by the Constitution.

9. If the burdens imposed on plaintiffs and the benefits conferred on their employees by the provisions of the Act be held not to be compensation for services rendered, and hence not to be additional wages unconstitutionally fixed, then they are pure gratuities to the employees at the expense of plaintiffs, and the Act is unconstitutional since Congress is without power to impose upon plaintiffs the compulsory obligation to pay such gratuities, and in doing so the Act takes the property of plaintiffs without due process of law, in violation of the Fifth Amendment, and exceeds any powers of Congress under the Constitution.

10. The Act is unconstitutional and beyond the power of Congress under the commerce clause in that it is not confined to a regulation of present and future commerce, which alone Congress can regulate, but undertakes retroactively to regulate commerce, and the relations of employer and employee in commerce, already past, completed, and performed throughout many years of the past, by imposing irreparable burdens on plaintiffs and at plaintiffs' expense conferring great benefits on their employees not confined to the basis of any employment relation existing, or services performed or to be performed, in connection with any present or future commerce subject to regulation by Congress, but based on employment relations and on services rendered in connection with commerce (in so far as connected in any way with commerce) which was carried on, accomplished and fully completed in the past, commerce which Congress not only has no power to regulate but cannot possibly reach with regulation. And in undertaking to impose such burdens on plaintiffs on account of past and completed transactions the Act is not one of legislation but is an attempt to invade a field in which the government has no power and thus unconstitutionally takes the property of plaintiffs without due process of law in violation of the Fifth Amendment.

11. The Act is unconstitutional in that it arbitrarily, unreasonably, and unlawfully classifies and discriminates between and against plaintiffs, and denies them the equal protection of the laws, by undertaking to mingle and pool their responsibilities and obligations, and to impose upon each plaintiff burdens and to confer upon its employees benefits, not based upon or measured by the employment relation existing or which has existed between such plaintiff and its own employees or services performed for such plaintiff by its own employees, but upon a basis or measure which makes such plaintiff also responsible for employment relations which have in the past existed between such employees and any other carrier in the United States, and for services which have in the past been performed by such employees to any other carrier in the United States, thus taking the property of each of the plaintiffs without due process of law in violation of the Fifth Amendment.

12. The Act is unconstitutional in that, as construed and interpreted by defendants and as defendants admit they intend to enforce and apply it, it imposes upon the plaintiffs burdens and confers cor-

responding benefits upon persons who are not employees of any carrier, who are not in any way connected with or related to interstate commerce, interstate transportation, or any business carried on by plaintiffs or any other carrier, and thereby the Act exceeds any power delegated to Congress under the Constitution, and arbitrarily deprives plaintiffs of their property without due process of law, in violation of the Fifth Amendment.

13. The Act is unconstitutional because it exceeds the powers of Congress under the commerce clause and deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment, by arbitrarily and unreasonably providing, as construed and interpreted by defendants and as defendants admit they intend to enforce and apply the Act, that many employees of plaintiffs who have a service period of thirty years past service and are between 51 and 65 years, even though entirely competent to continue in efficient service, shall have the absolute personal election, subject to no control by plaintiffs, to retire from carrier service and then demand and thereby impose upon plaintiffs the obligation to pay them annuities until death, such obligation being based not upon the character of service in which they are engaged, not upon their unfitness for further service, not taking into account the need of plaintiffs or of the public for their continuance in carrier service, and being based upon no criterion or fact having any reasonable relation to regulation of present or future commerce, but being based solely upon the facts of the existence of thirty years' past service period and the election of such employee to demand retirement with annuities.

14. The Act is unconstitutional because it exceeds the powers of Congress under the commerce clause and deprives plaintiffs of their liberty of contract and takes their property without due process of law, in violation of the Fifth Amendment, by arbitrarily requiring the retirement from the employment and service of each of the plaintiffs many able, skilled, and valuable employees, whose ability, experience, and training are valuable to plaintiffs and contribute to the efficient, economical, and safe conduct of their businesses, requiring such retirement solely on the arbitrary ground of age, regardless of continued mental and physical health and capacity of such employees, and making such requirement for no possible purpose of contributing to the safety and efficiency of interstate transportation or of benefiting interstate commerce, but solely for the purpose of making possible greater employment opportunity and more rapid advancement in the service of plaintiffs of younger, less experienced, less capable, and less valuable employees.

15. The Act is unconstitutional and arbitrarily and unreasonably deprives the plaintiffs of their property without due process of law in violation of the Fifth Amendment by conferring upon employees now in the employ of plaintiffs, who are 70 years of age or more and must under the terms of the Act be permanently retired with the right to annuities until death, bounties, two-thirds of which must be paid by the carriers, arbitrarily and unreasonably disproportionate to the contributions which will be paid by such employees.

16. The Act is unconstitutional because it exceeds the powers of Congress under the commerce clause, and arbitrarily and unreasonably deprives plaintiffs of their property without due process of law

in violation of the Fifth Amendment by imposing upon plaintiffs, as interpreted and construed by defendants and as defendants admit they intend to enforce and apply it, the obligation to pay annuities to unfaithful employees whom the plaintiffs have necessarily discharged from their service for cause, and because their services were detrimental to the safety and efficiency of the business of plaintiffs.

17. The Act is unconstitutional becausa it exceeds the powers of Congress under the commerce clause, and arbitrarily and unreasonably deprives plaintiffs of their property without due process of law, in violation of the Fifth Amendment, by imposing upon plaintiffs, as construed and interpreted by defendants and as defendants admit they intend to enforce and apply it, the burden of paying annuities to any of the employees of any carrier in its service subsequent to the enactment of the Act and who shall leave such service at any age and with any service period whatever, which annuities are not payable until such persons reach 65 years of age, but are payable then and thereafter until death, regardless of how long such persons at that time shall have been entirely out of such service.

18. The Act is unconstitutional and takes plaintiffs' property without due process of law in violation of the Fifth Amendment in that it arbitrarily and unreasonably classifies and discriminates between plaintiffs and between plaintiffs and other carriers by imposing upon those carriers who have no employees who, at the time of the approval of the Act, had reached the age of 70 and would be, therefore, subject to retirement and annuities on February 1, 1935, the burden of contributing to such annuities, by contributions to the general fund, for such employees who are employees of other carriers.

19. The Act is unconstitutional because it exceeds the power of Congress under the commerce clause and takes plaintiffs' property without due process of law in violation of the Fifth Amendment, in that it arbitrarily and unreasonably imposes upon all other carriers the great burden of annuity payments to persons who have not been employed in any carrier service since June 27, 1933, but who had prior service, in the event of any future employment of such former carrier employees by any carrier whatsoever subject to the Act, and by giving to any such carrier desiring to employ any such former carrier employee at any time in the future, even if only for a day of such new employment, the power thereby to impose on all other carriers contributing to the common fund, without their knowledge or consent, the obligation to contribute to annuities to such employee payable when he reaches 65 years of age, and based upon service for any and all carriers performed prior to June 27, 1933, as well as upon service subsequent thereto, when but for the purely fortuitous fact of such new employment by such one carrier such former employee would not be within the terms of the Act or entitled to any benefits thereunder.

20. The Act is unconstitutional and exceeds the power of Congress under the commerce clause and deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment, in that it imposes upon all remaining carriers continuing in business the obligation to contribute through the common fund to annuities

to persons who have retired with right to annuities under the Act from the employment and service of carriers which shall through insolvency, bankruptcy, abandonment, or any other cause cease to exist and to engage in the business of carrier.

21. The Act is unconstitutional because it exceeds the power of Congress under the commerce clause and deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment, in that it imposes upon plaintiffs intolerable and irreparable burdens, having no reasonable relation to any legitimate end of regulation of commerce, burdens which plaintiffs are powerless to raise added revenues to meet, at a time when, by reason of decline of business and general business depression over which plaintiffs have no control, none of the plaintiffs is earning a fair return on the fair value of its property useful and used in railroad service, many of plaintiffs are not earning or able to earn operating expenses and taxes, added wage costs and costs of materials and supplies are adding millions of dollars annually to plaintiffs' operating expenses, and other unregulated forms of transportation to which the Retirement Act also does not apply are diverting enormous amounts of traffic and revenues from plaintiffs.

22. The Act is unconstitutional because it exceeds the power of Congress under the commerce clause and deprives plaintiffs of their property without due process of law, in that it arbitrarily and unreasonably imposes upon plaintiffs burdens and injuries so great as unnecessarily and unreasonably to diminish their capacity to furnish adequate, safe, and efficient transportation service and as not only to have no reasonable relation to any legitimate end of regulating, promoting, fostering, or developing of interstate commerce, but to be greatly prejudicial to such end.

23. The Act is unconstitutional because it exceeds the power of Congress under the commerce clause and deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment in that it unreasonably and by arbitrary fiat undertakes to force plaintiffs to engage in the business of social insurance against old age and unemployment, a business which Congress is entirely without power to require them to carry on.

24. The Act is unconstitutional because it is in excess of the power of Congress under the commerce clause and deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment, in that it arbitrarily and unreasonably interferes with the constituttional right of plaintiffs to manage their own properties and businesses.

25. The Act is unconstitutional and beyond the power of Congress under the Constitution and takes the property of plaintiffs without due process of law in violation of the Fifth Amendment, in that it is not legislation but is experimentation at the expense of plaintiffs, arbitrarily and unreasonably authorizes defendants to require of plaintiffs contributions in unlimited amounts for administration and research, thus delegating arbitrary and uncontrolled power to the defendants as administrative officers to take the property of plaintiffs by administrative fiat, for purposes not only of administration of the Act itself as enacted legislation but also for purposes of unlimited research and investigation to procure for Congress information upon

which to base future legislation, a purpose which is governmental and which Congress has no constitutional power to impose on plaintiffs.

26. The Act is inseparable and it is impossible for the Court by construction to eliminate the unconstitutional features and leave a remaining valid Act.

27. The Act in its entirety is unconstitutional, null, and void and its enforcement by defendants must be permanently enjoined and restrained.

This the day of , 1934.

_____,
Chief Justice.

Respectfully submitted and prayed.

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Final decree

Filed October 30, 1934

This cause came on to be heard upon plaintiffs' application for a preliminary injunction and at the close of the hearing it was agreed of record between the parties that the hearing should constitute the final hearing.

Whereupon the Court, upon the whole record having held the Railroad Retirement Act to be unconstitutional and invalid, as shown by Memorandum Opinion filed October 24, 1934,

It is now, therefore, considered, adjudged, and decreed that the defendants and each of them and their successors in office and all those acting or claiming to act under their authority be, and they are, permanently restrained and enjoined from making any order and instituting or taking any steps toward the institution of any actions, proceedings, or prosecutions designed to compel plaintiffs or their officers, or any of them, to make any advance payment or other payment required by the Act, or to compel them to assemble, compile, or furnish any information and records required, or which may be required to be furnished under the Railroad Retirement Act, or to compel them to change their existing relations with any of their employees, or in anywise to put plaintiffs in a worse position with respect to any matters herein involved.

It is further considered, adjudged, and decreed that the Railroad Retirement Act and each and every provision thereof is void and of no effect.

This the 30th day of October, 1934.

ALFRED A. WHEAT,
Chief Justice.

From the foregoing decree, the defendants note an appeal in open court to the United States Court of Appeals of the District of Columbia.

ALFRED A. WHEAT,
Chief Justice.

Assignment of Errors

Filed November 5, 1934

Now come the defendants in the above-entitled cause and file the following assignment of errors upon which defendants will rely upon the prosecution of their appeal in said cause from the final decree entered herein on the 30th day of October 1934.

The Court erred:

1. In holding in Paragraph 1 of the Conclusions of Law that the Railroad Retirement Act is unconstitutional because it applies to all employees of carriers subject to the Act.

2. In failing to hold that the business of the plaintiffs in all its phases closely affects interstate commerce and that there is a reasonable relationship between the application of the Act to all employees of the plaintiffs and the accomplishment of the purposes of the Act with respect to interstate commerce.

3. In holding in Paragraph 2 of the Conclusions of Law that the Railroad Retirement Act is unconstitutional because it provides for the payment of annuities measured in part by time spent in service prior to the enactment of the Act.

4. In holding in Paragraph 3 of the Conclusions of Law that the provision of the Act which includes as employees subject to the Act those who have left the service of the plaintiffs within one year prior to its enactment is unconstitutional.

5. In holding in Paragraph 4 of the Conclusions of Law that the provisions of the Act, with the exception of that mentioned in the preceding paragraph, are inseparable and that it is impossible for the court to eliminate any of the other provisions of the Act without destroying the entire scheme and purpose of the Act.

6. In holding in Paragraph 5 of the Conclusions of Law that the Act is in its entirety unconstitutional and that by its enforcement the plaintiffs and each of them would be irreparably injured.

7. In failing to hold that the Act is a reasonable regulation of interstate commerce.

8. In holding in Paragraph 6 of the Conclusions of Law that the plaintiffs are entitled to the relief prayed for in their Bill of Complaint.

9. In finding in Paragraph 9 of the Findings of Fact that a substantial proportion of the total number of employees of each plaintiff consists of employees whose work is exclusively confined to duties in connection with phases of the business of the plaintiffs other than interstate transportation and having no connection with interstate transportation.

10. In finding that the duties of the employees referred to in Paragraph 9 of the Findings of Fact are exclusively confined to those therein enumerated and have no connection with interstate transportation; and in finding in Subparagraphs 4, 5, 9, 10, 11, 12, 13, 14, and

15 of Paragraph 9 that the facilities therein referred to were not devoted to transportation or transportation service.

11. In failing to find that the employees referred to in Paragraph 9 of the Findings of Fact are necessary to the maintenance of the interstate transportation service of the plaintiffs and that they participate in phases of the plaintiffs' business which closely affect interstate commerce and transportation; and in failing to hold that the efficiency of each of such employees and groups of employees closely affects the efficiency of the interstate transportation service of each of the plaintiffs and of the transportation system of the United States as a whole.

12. In making the findings contained in Paragraphs 11, 14, 17, 20, 21, 22, 26, and 27 of the Findings of Fact without support in the evidence and contrary to the weight of the evidence.

13. In finding in Paragraph 20 of the Findings of Fact that the plaintiffs have no higher percentage of employees 65 years of age or over than other heavy industries in general; in failing to find that the proportion of superannuated employees in the railroad industry is higher than that in comparable industries; and in failing to find that the rate of retirement of aged railroad employees has been declining in recent years and the proportion of superannuated employees in the service has been rapidly increasing.

14. In finding, contrary to the weight of the evidence, in Paragraph 32 of the Findings of Fact, that the existing voluntary pension systems of the carriers were established for the reasons principally of encouraging loyalty and continuity of service, and that the compulsory system set up under the Retirement Act would be destructive of these two purposes.

15. In failing to find that the plaintiffs' voluntary pension plans have failed to achieve the benefits of sound retirement and pension plans.

16. In failing to find that the plaintiffs' voluntary pension plans have threatened to break down.

17. In failing to find that the Railroad Retirement Act is calculated to improve railroad labor relations and railroad labor morale.

18. In failing to find that the Act will promote efficiency and safety in interstate transportation.

Wherefore defendants pray that said decree of October 30, 1934, be reversed and that a decree be entered herein dismissing the Bill of Complaint.

HAROLD M. STEPHENS,
Assistant Attorney General.

HAMMOND E. CHAFFETZ,
Special Assistant to the Attorney General.

HARRY SHULMAN,
Special Counsel,
Railroad Retirement Board.

Service of the foregoing, and receipt of a copy thereof, is hereby acknowledged on behalf of the plaintiffs, this 5th day of November, 1934.

SIDNEY S. ALDERMAN,
Of Counsel for Plaintiffs.

Praecipe for transcript of record

Filed November 5, 1934

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the District of Columbia, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Bill of Complaint of plaintiffs, filed August 13, 1934.
2. Answer of defendants, filed September 5, 1934.
3. Statement of evidence, including, as indicated therein, plaintiffs' Exhibits Nos. 1 to 50, inclusive; defendants' Exhibits Nos. 1 to 13, inclusive; and plaintiffs' objections to defendants' affidavits.
4. Opinion of the Court, filed October 24, 1934.
5. Findings of fact and conclusions of law, filed October 30, 1934, and plaintiffs' requests for conclusions of law.
6. Decree of the Court, filed October 30, 1934.
7. Assignment of errors, filed November 5, 1934.
8. This praecipe for transcript of record. Dated November 5, 1934.

HAMMOND E. CHAFFETZ,
Special Assistant to the Attorney General.

Service of the foregoing praecipe is hereby acknowledged and designation of any additional portions of the record is hereby waived this 5th day of November 1934.

SIDNEY S. ALDERMAN,
Counsel for Appellees.

Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 560, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 57557 in Equity, wherein The Alton Railroad Company and Others are Plaintiffs and Railroad Retirement Board and Murray W. Latimer, John T. Williamson and Lee M. Eddy, Individually and as Members of The Railroad Retirement Board, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of November 1934.

[SEAL] FRANK E. CUNNINGHAM,
Clerk.
By CHAS. P. OFLIN, *Assist. Clerk.*

(Endorsement on cover:) District of Columbia Supreme Court. No. 6355. Railroad Retirement Board et al., appellants, vs. The Alton Railroad Company and Others. United States Court of Appeals for the District of Columbia. Filed Nov. 13, 1934. Henry W. Hodges, clerk.

96806—34——19

United States Court of Appeals for the District of Columbia

I, Henry W. Hodges, clerk of the United States Court of Appeals for the District of Columbia, do hereby certify that the foregoing pages numbered from 1 to 283, inclusive, constitute a true copy of the record in the case of Railroad Retirement Board and Murray W. Latimer, John T. Williamson and Lee M. Eddy, individually and as members of the Railroad Retirement Board, appellants, vs. The Alton Railroad Company and Others, which case has not been heard by this court, the appellants requesting a certified copy of the record in order to apply for certiorari to the Supreme Court prior to hearing and decree by this court under United States Code, title 28, section 347 (Judicial Code, sec. 240 amended) No. 6355, October term, 1934, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 7th day of December, A. D. 1934.

[SEAL]

HENRY W. HODGES,
Clerk of the United States Court of Appeals for the District of Columbia.
By MONCURE BURKE,
Deputy Clerk.

Supreme Court of the United States

Order allowing certiorari

Filed December 17, 1934

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. ——

RAILROAD RETIREMENT BOARD ET AL., PETITIONERS

v.

THE ALTON RAILROAD COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General prays that a writ of certiorari issue to bring before this Court the suit now pending in the United States Court of Appeals for the District of Columbia, there entitled *Railroad Retirement Board, et al.*, v. *The Alton Railroad Company, et al.*, No. 6355, which has not been submitted to, heard, or decided by that court. The suit involves the constitutionality of the Act of Congress of June 27, 1934, known as the Railroad Retirement Act, which establishes a compulsory re-

tirement and pension system, applicable to employees of interstate railroad carriers.

OPINION BELOW

The opinion of the Supreme Court of the District of Columbia (R. 261) has not yet been reported.

JURISDICTION

The final decree of the Supreme Court of the District of Columbia was entered on October 30, 1934. (R. 279.) Appeal was taken and allowed on the same day and the case was docketed in the Court of Appeals November 13, 1934. (R. 280, 283.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of June 13, 1925.

QUESTIONS PRESENTED

1. Whether the Railroad Retirement Act is unconstitutional because it applies to *all* employees of carriers subject to the Act, including employees not directly engaged in interstate transportation.

2. Whether the Act is unconstitutional because it provides for the payment of retirement annuities computed, in part, by reference to time spent in railroad service prior to the enactment of the statute.

3. Whether the provision of the Act which includes among the employees subject thereto those who were in the service of the carriers within one year prior to the enactment of the Act, is unconstitutional.

STATUTE INVOLVED

The Act of Congress of June 27, 1934, c. 868, 48 Stat. 1283, known as the Railroad Retirement Act, is set forth in full in the Appendix, *infra*, pp. 15–29.

STATEMENT

Respondents, comprising substantially all the Class I railroads of the country, the Pullman Company, and two railway express companies, filed this suit in the Supreme Court of the District of Columbia against petitioners, the Railroad Retirement Board and the three individual members of that Board, to enjoin the enforcement of the Railroad Retirement Act. The case came on to be heard upon respondent's application for a temporary injunction and, after both sides had submitted evidence in the form of affidavits, it was stipulated that the hearing be considered a final hearing. (R. 261.)

The Railroad Retirement Act sets up a retirement and pension system for all employees of carriers by railroad subject to the Interstate Commerce Act. The purposes of the Act, as stated in Section 2 (a), are to provide "adequately for the satisfactory retirement of aged employees" to promote "efficiency and safety in interstate transportation," and to make possible "greater employment opportunity and more rapid advancement of employees in the service of carriers."

The retirement and pension system established by the Act applies to all persons employed by a

carrier subject to the Act after its enactment, and also to all persons who had been employed by such a carrier within one year before the enactment of the statute. (Sec. 1 (b), *infra*, p. 16.) Retirement is made compulsory at the age of 65, but may be extended by written agreement between the carrier and employee for successive periods of one year each until the age of 70. (Sec. 4, *infra*, p. 20.) Each employee who has attained the age of 65 and who does not continue in the service of a carrier is entitled to receive an annuity calculated by the application of graduated percentages of the employee's average monthly compensation to the number of years of his service, not exceeding 30. (Sec. 3, *infra*, pp. 18–20.) Any employee who has completed 30 years of service may retire before the age of 65, but in that event the annuity is reduced by one-fifteenth for each year that the employee is below the age of 65 (unless the retirement was due to physical or mental inability to continue in active service). (*Ibid.*)

Funds necessary for the payment of annuities and for the expenses of administering the Act are to be raised by contributions from employees and carriers. (Sec. 5, *infra*, pp. 20–21.) The contribution of employees is to be a certain percentage of their compensation and the contribution of each carrier twice the contribution of its employees. (*Ibid.*) The Board may determine from time to time what percentage is necessary to provide the needed

funds, but until the Board otherwise determines the employee contribution is to be 2% of compensation. (*Ibid.*) Employee contributions are to be deducted by each carrier from the compensation of its employees and are to be paid by the carrier, together with its own contributions, into the Treasury of the United States quarterly, or at such other times as ordered by the Board. (*Ibid.*) Moneys so paid into the Treasury are to be kept in a separate "railroad retirement fund." (Sec. 8, *infra*, p. 23.)

The Board is given general authority to administer and enforce the Act, including power to require carriers and employees to furnish it necessary information and records and power to require such advance payments by carriers as may be necessary to put the Act into operation. (Sec. 9(b), *infra*, pp. 25–26.) The first quarterly payment under the Act was due November 1, 1934, and the first annuity payments thereunder are to begin February 1, 1935. (Secs. 1 (l), 3, *infra*, pp. 17, 19.)

The Supreme Court of the District of Columbia concluded that Congress has power to enact a statute "providing for the compulsory retirement at a certain age of employees of railroads engaged in interstate commerce, together with provisions for the pensioning of employees so retired." (R. 262.) But it held that the instant act exceeds the power of Congress because it applies to *all* of respondents' employees, "making no distinction between those

[employees] engaged in interstate commerce and those not so engaged." (R.263–264.) It also held that the provisions of the Act requiring payment of annuities based in part upon services rendered prior to the adoption of the Act constitute a taking of property without due process of law. (R. 264.) These provisions were held to be inseparable and incapable of elimination without destroying the entire scheme and purpose of the Act. (R. 273.) The court further held the Act invalid insofar as it applies to persons who had been employed within a year prior to its passage and who do not subsequently return to railroad service; but it held that this provision was separable and that its unconstitutionality did not impair the validity of the statute as a whole. (R. 264, 273.)

The court entered a decree declaring the Railroad Retirement Act unconstitutional and permanently enjoining petitioners from making any order or taking any other action designed to compel respondents to make any advance payment or other payment required by the Act, to compile or furnish any information or records, or to change their existing relations with any of their employees. (R. 279.) The case was docketed in the Court of Appeals for the District of Columbia within two weeks after the entry of this decree.

SPECIFICATION OF ERRORS TO BE URGED

Each of the errors assigned by petitioners (R. 280) in support of their appeal to the Court of

Appeals for the District of Columbia will be relied upon in this Court.

REASONS FOR GRANTING THE WRIT

1. The questions presented in this case are questions of constitutional law involving the validity of an Act of Congress which directly affects over 1,000,000 employees and all interstate commerce carriers by railway. It is submitted that these questions are sufficiently doubtful and of sufficient importance to warrant review by this Court, and that the public interest will be promoted by their early settlement in this Court. The trial court said that petitioners' answer to the bill of complaint raises "no serious issue of fact." (R. 261) Such disputed questions of fact as may be involved will not seriously affect the broad issues in the case and will not be difficult to resolve. All of the evidence is in the form of affidavits or statistical tables. There would therefore seem little necessity for obtaining the decision of an intermediate appellate court prior to consideration by this Court. While petitioners have assigned as error certain of the findings of fact made by the trial court, the errors so assigned primarily relate to conclusions of law embodied in the court's factual findings or to the inferences which it has drawn from non-conflicting affidavit testimony.

2. The Act provides that payment of annuities shall begin February 1, 1935. Delay in final de-

cision of the cause will postpone the payment of annuities beyond the time intended by Congress. In addition, the Board is under a duty to investigate carefully all applications for annuities in order to determine each applicant's right to an annuity under the Act and the amount of such annuity, if any is due. Even after a final decision upholding constitutionality, the necessary preliminary investigation of applications will further delay putting into effect the policies adopted by Congress. Such delay will be a particular hardship upon present employees over the age of 70, and upon those between the ages of 65 and 70 whose services are not extended by agreement, since their immediate retirement is made compulsory by the Act but the Board will be unable to direct the immediate payment of compensating annuities, as contemplated by the Act. The public is necessarily concerned when the operation of an important act of Congress is suspended by court decree. (Compare *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *Dryfoos* v. *Edwards*, 284 Fed. 596, 603 (S. D. N. Y.).

3. Congress has appropriated no money for the administration of the Act other than that which is paid into the Treasury by the carriers under the Act. The final decree entered by the trial court enjoins collection of any part of the contributions required by the Act and the small advance payment made by the carriers prior to the trial, pur-

suant to an order of the Board, is being rapidly depleted. The trial court denied petitioners' application for a partial stay pending appeal which, if granted, would have allowed the Board to demand a further small advance payment from the carriers. The evident purpose of Congress in providing a six months' period between the effective date of the Act and the first payment of annuities was to allow the Board sufficient time to lay the necessary groundwork for administering the important powers vested in it. The preliminary preparations essential to effective administration, including maintenance of the Board's existing organization and personnel, are seriously interfered with as long as the constitutionality of the Act and the Board's ability to pay its employees remain uncertain.

4. Prompt determination of the constitutionality of the Act is of vital concern to many thousands of employees who, by its terms, will be entitled to annuity payments on and after February 1, 1935, and to the families of such employees. Early decision is also a matter of great importance to the more than 1,000,000 present employees of carriers subject to the Act. The carriers generally are now withholding 2% of the wages of their employees, in order to be able to satisfy the requirements of the Act should it finally be held constitutional. It is in the public interest that it be promptly deter-

mined whether the wage deductions already made should continue to be withheld and whether future wage payments should be subjected to like deductions.

Wherefore, it is respectfully submitted that this petition should be granted.

J. Crawford Biggs,
Solicitor General.

December 1934.

BRIEF IN SUPPORT OF PETITION

ARGUMENT

We have set forth (*supra*, pp. 7–10) under Reasons for Granting the Writ the grounds for our belief that the instant case presents questions of constitutional law which should be reviewed by this Court and that the public interest will unquestionably be promoted by prompt settlement in this Court of the questions involved. We shall therefore confine the brief in support of petition to a summary statement of the statutory authority, rules of court, and decided cases which support issuance of certiorari at the present stage of the proceedings.

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U. S. C., Title 28, Sec. 347), provides:

> In any case, civil or criminal, in a circuit court of appeals, *or in the Court of Appeals of the District of Columbia*, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, *either before or after a judgment or decree by such lower court*, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect,

> as if the cause had been brought there by unrestricted writ of error or appeal. (Italics ours.)

Rule 39 of the rules of this Court provides:

> Proceedings to bring up to this court on writ of certiorari *a case pending in* a circuit court of appeals or *the Court of Appeals of the District of Columbia, before judgment is given in such court,* should conform, as near as may be, to the provisions of Rule 38; and similar reasons for granting or refusing the application will be applied. *That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason.* (Italics ours.)

It is submitted that the following cases in which this Court has issued writs of certiorari prior to judgment in the Circuit Courts of Appeal indicate that the public interest will be promoted, within the contemplation of Rule 39, by the prompt settlement in this Court of the questions involved in the present case:

The Three Friends, 166 U. S. 1, 49, involved the construction of a statute providing for the forfeiture of any vessel fitted out and armed with the intent that it be employed to commit hostilities against the subjects, citizens and property of any State or people with whom the United States are at peace.

Forsyth v. *Hammond,* 166 U. S. 506, 514, involved review of a decision of a Circuit Court of

Appeals which was not final but which was in conflict with a decision of the Supreme Court of the State in which the case arose.

In *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, the losing party in the Circuit Court appealed both to this Court and to the Circuit Court of Appeals. Prior to decision by the Circuit Court of Appeals, this Court issued a writ of certiorari and, in deciding the case on the merits, said that it was unnecessary to determine to which court an appeal properly lay since the case was then before this Court either by appeal or by writ of certiorari.

In *White* v. *Mechanics Securities Corporation*, 269 U. S. 283, 299; *Royal Insurance Co.* v. *Fleet Corporation*, 280 U. S. 320, 325; and *Eastern Equities Corp.* v. *United States*, 282 U. S. 409, 415 (note 2), where writs were issued prior to decision in the Circuit Court of Appeals, other cases raising the same questions were before this Court either on appeal or on certiorari. The cases involved the construction of the Trading With the Enemy Act, the Suits in Admiralty Act, and the income tax law, respectively.

Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U. S. 299, 305, involved the question of whether a particular railroad was within the phrase "interurban electric railways" used in one of the sections of the Interstate Commerce Act.

United States v. *Bankers Trust Company* (Nos. 471 and 472, October Term, 1934, certiorari granted November 5, 1934), involved the validity of the provisions of the Joint Resolution of Congress of June 5, 1933, declaring every provision in any obligation purporting to give the obligee the right to require payment in gold or in an amount in money of the United States measured thereby, to be against public policy.

See also *Degge* v. *Hitchcock*, 229 U. S. 162, 170 and *Gay* v. *Ruff*, 292 U. S. 25, 30.

CONCLUSION

It is respectfully submitted that the public interest will be promoted in the granting of this petition and the resultant prompt settlement in this Court of the questions involved.

J. CRAWFORD BIGGS,
Solicitor General.

DECEMBER 1934.

APPENDIX

The Railroad Retirement Act of June 27, 1934, c. 868, 48 Stat. 1283, provides as follows:

AN ACT

To provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business

of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means each person in the service of a carrier, subject to its continuing authority to supervise and direct the manner of rendition of his service, who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service. The term "employee" also includes each officer or other official representative of an "employee organization" herein called "representative", who has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during, or following employment by a carrier, is engaged in such representative service in behalf of such employees.

(c) The term "Board" means the Railroad Retirement Board hereby created.

(d) The term "annuity" means regular payments at the end of each completed month during retirement, ceasing at death or at resumption of compensated service.

(e) The term "service" means the employment relation between an employee and a carrier whether before or after the enactment hereof.

(f) The term "service period" means the total service of an employee for one or more carriers whether or not continuously performed, and includes as one month every calendar month during which the employee has been paid compensation by a carrier and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(g) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(h) The term "age" means age at the latest attained birthday.

(i) The term "carrier contribution" means the payment to be made by each carrier.

(j) The term "employee contribution" means the payment to be made by each employee.

(k) The term "voluntary contribution" means the payment made by an employee equal to the total of both the employee and the carrier contribution.

(l) The term "effective date" means the 1st day of the second month after the taking effect of this Act.

(m) The term "Railroad Retirement Act" means and may be used in citing this Act and subsequent amendments thereto.

Purposes

Sec. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in

interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this Act to perform and fulfill the obligations imposed thereby. This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

SPECIAL REPORT

(b) Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy and permanency of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations.

ANNUITIES

S. . 3. Each employee having attained the age of sixty-five years, or having completed a service period of thirty years, shall be paid an annuity, to begin on a date specified in a written application,

which date shall not be more than sixty days before the making of the application. No annuity shall begin less than six months after the effective date. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the number of years of service, not exceeding thirty years, by the following percentages of the monthly compensation: 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the compensation in excess of $150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee has received compensation from any carrier out of eight consecutive calendar years of such services ending December 31, 1931. No part of any monthly compensation in excess of $300 shall be recognized in determining any annuity for any employee contribution. The annuity shall be reduced by one-fifteenth of such annuity for each year the employee is less than sixty-five years of age at the time of the first annuity payment. No such reduction shall be made if the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. Upon death of an employee before or after retirement an amount, equal at his death to a computation, with interest at 3 per centum compounded annually, of the accumulation from his payments less any annuity payments received by him, shall

be paid as he may have designated or to his legal representative. Any employee who upon retirement shall be entitled to an annuity with a value determined by the Board of less than $300 shall be paid such value in a lump sum.

RETIREMENT

SEC. 4. Retirement shall be compulsory upon employees who, on the effective date, have attained or thereafter shall attain the age of sixty-five years. The carrier and the employee may, by an agreement in writing filed with the Board, extend the time for retirement as to such employee for one year and for successive periods of one year each, but not beyond the age of seventy years. Until five years from the effective date, the compulsory retirement shall not apply to an employee who from and after the effective date occupies an official position in the service of a carrier.

CONTRIBUTION

SEC. 5. Each employee shall pay an employee contribution in a percentage upon his compensation. Each carrier shall pay a carrier contribution equal to twice the contributions of each employee of such carrier. The employee compensation shall be the compensation for service paid to such employee by the carrier excluding compensation in excess of $300 per month. The contribution percentage shall be determined by the Board from time to time, and shall be such as to produce from the combined employee and carrier contributions, with a reasonable margin for contingencies, the amount necessary to pay the annuities, other disburse-

ments and the expenses becoming payable from time to time. Until the Board shall determine on a different percentage the employee contribution percentage shall be 2 per centum. Employee contributions shall be deducted by the carrier from the compensation of its employees and shall be paid by the carrier, together with the carrier contributions, into the Treasury of the United States quarterly or at such other times as ordered by the Board.

EXISTING PENSION SYSTEMS

SEC. 6. The Board shall have the power to provide by appropriate rules and regulations for substituting the provisions for annuities and other benefits to employees under this Act, for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and to transfer such obligations to the retirement system herein established. If the fulfillment of any such transferred obligation shall require additional contributions or larger payments than would otherwise be required under the provisions of this Act, then such additional contributions shall be made by the carrier originally responsible for the creation of such obligation or for the excess amount of such payments over those which would be required under the provisions of this Act. In the event that the Board is unable to make satisfactory arrangements with any carrier for the substitution of the

provisions under this Act for its existing pension system, then, and in that event, the provisions of this Act shall be applied to said carrier and its employees without regard to any conflict or duplication in the operation of such an existing pension system and the operation and effect of the provisions of this Act: Provided, That the Board, at its option, shall have power, in lieu of the foregoing provisions of this section, to order that all former employees of carriers, who prior to the effective date have become separated from the service at the age of seventy years or over and who may or may not be receiving age retirement benefits, shall be entitled to the benefits of this Act.

EMPLOYEE REPRESENTATIVES

SEC. 7. Any representative of an employee organization who is included within the definition of "employee" in paragraph (b), section 1, of this Act shall have the option, but, shall not be required to continue or to become a beneficiary under the provisions of this Act. If he shall elect to continue or to become such a beneficiary he shall pay all voluntary contributions.

For the purposes of this section the requirements of section 4 of this Act shall not apply. Service rendered to an employee organization shall be included in computing the total service period of such representative.

For such representative who shall elect to become a beneficiary under this Act, the basic compensation upon which contributions shall be made and benefits calculated shall be that compensation paid by the carrier for service rendered in the

position to which the rights of such representative would entitle him for the period defined in section 3 of this Act: *Provided,* That if no definite and specific rights obtain, the average compensation paid to the four employees whose last date of entry in the service is nearest the date of entry in the service of the same carrier by such representative, shall be his basic compensation to be determined for the period defined in section 3 of this Act. When a question arises as to rights under this provision the Board shall investigate and determine rights of such representative.

For such representative who elects to continue as a beneficiary under the provisions of this Act, his basic compensation shall be the average monthly compensation paid to him by the carrier during the last twelve months of active service with such carrier.

RETIREMENT FUND.

SEC. 8. All moneys paid into the Treasury under the provisions of this Act, all interest, and other receipts, and all refunds of moneys paid out under this Act shall constitute and be kept in a separate fund in the Treasury to be known as the "railroad retirement fund." At the request and direction of the Board, the Treasurer of the United States, with the approval of the Secretary of the Treasury, is authorized to invest such funds as are not immediately required for disbursements in interest-bearing bonds, notes, or other obligations of the United States, and to collect the principal and interest of such securities and to sell and dispose of the same as in the judgment of the Board shall be in the interest of said fund. There is hereby

appropriated such sums not in excess of the amounts in said fund as may be necessary to pay all annuities, other disbursements and the expenses of administration of this Act.

RETIREMENT BOARD

SEC. 9. (a) PERSONNEL.—There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years, without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or other-

wise interested in any carrier or organization of employees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act. The members and employees of the Board shall be included as employees under this Act and together with employees receiving annuities shall be furnished free transportation in the same manner as such transportation is furnished to employees.

(b) DUTIES.—The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall receive and take such steps and institute and prosecute such proceedings and actions as may be necessary to enforce the payments and obligations required under the Act, make and certify awards and payments, and account for all moneys and funds necessary thereto. The Board may require such advances upon the payments of carriers as necessary to put this Act into operation. The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated therefor, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other

payments, and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board and shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the payments to be required to provide for all annuities, other disbursements and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

COURT JURISDICTION

SEC. 10. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction to entertain an

application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by the Board to compel an employee or other person residing within the jurisdiction of said court, or a carrier subject to service of process within said jurisdiction, to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this Act.

(b) An application by an employee or carrier to the Supreme Court of the District of Columbia or to the district court of any district wherein the Board maintains an office or has designated an agent authorized to accept service in its behalf, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take an action, or to make a decision necessary for the enforcement of a legal right of the applicant, when the applicant shall establish his right to a judicial review upon the jurisdictional ground that, unless he is granted a judicial review of the action or decision, or failure of the Board to act or to decide, of which he complains, he will be deprived of a constitutional right to obtain a judicial determination of his alleged right.

(c) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

EXEMPTION

SEC. 11. No annuity or death payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever.

PENALTY—CARRIER

SEC. 12. On the failure of any carrier to make any payment when due under the provisions of this Act, such carrier, unless excused by order of the Board, shall pay an additional 1 per centum of the amount of such payment for each month such payment is delayed.

OTHERS

SEC. 13. Any employee, other person, officer, or agent of a carrier subject to this Act who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act or who shall willfully fail or refuse to make any accounting required under this Act, or who shall knowingly make any false or fraudulent statement or report required for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act shall be punished by a fine of not less than $100 nor more than $10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 566

RAILROAD RETIREMENT BOARD ET AL., PETITIONERS

v.

THE ALTON RAILROAD COMPANY, ET AL.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The only opinion previously rendered in this case is that of the Supreme Court of the District of Columbia (R. 261), not yet reported.

JURISDICTION

The final decree of the Supreme Court of the District of Columbia was entered on October 30, 1934 (R. 279). Appeal was taken to the Court of Appeals (R. 280), and the case was docketed in that Court on November 13, 1934 (R. 283). The case was not submitted to the Court of Appeals, but a

petition for certiorari was filed in this Court on December 7, 1934, and was granted December 13, 1934 (R. 285).

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of June 13, 1925, 43 Stat. 938.

QUESTIONS PRESENTED

The following questions are presented by the decision of the lower court:

1. Whether the Railroad Retirement Act is unconstitutional, under *The Employers' Liability Cases*, because it applies to *all* employees of carriers subject to the Act, including employees claimed not to be directly engaged in interstate transportation.

2. Whether the Act, in providing for the computation of annuities on the basis of years of service, is unconstitutional because years of service rendered prior to the enactment of the statute are included.

3. Whether that provision of the Act is unconstitutional which includes among the employees subject to the Act those who were in the service of the carriers within one year prior to its enactment.

In respondents' memorandum filed in response to the petition for certiorari, it is indicated that they will urge in this Court in support of the decree below, in addition to the grounds on which the lower court based its decision, each of the other grounds on which the Act is alleged in the bill of

complaint to be unconstitutional. Accordingly, the following additional questions will be considered in this brief:

4. Whether the Retirement Act is within the power of Congress under the Commerce Clause, as an act intended, and reasonably calculated, to promote efficiency and safety, to improve labor conditions and relations, and to foster and protect the national transportation system.

5. Whether the Retirement Act is unconstitutional, in whole or in part, because it provides that employees who leave the service before the retirement age nevertheless retain the right to receive annuities, computed upon the years of actual service, payable when they do attain the retirement age.

6. Whether the Act is unconstitutional, in whole or in part, because it provides for voluntary retirement, with reduced annuity, at the conclusion of thirty years of service regardless of whether the employee has attained the compulsory retirement age.

7. Whether that provision of the Act is unconstitutional which gives employee representatives (duly designated under the Railway Labor Act) the option of participating in the retirement and pension plan established by the Act, provided that they pay into the retirement fund sums equivalent to the contributions required to be made, under the Act, by both employee and employer.

8. Whether the Act is unconstitutional because of its so-called "pooling" provisions, that is, (1) because it provides for the payment of retirement annuities out of a common fund to which all carriers subject to the Act and their employees are required to contribute on the basis of a percentage of wages, and (2) because it provides for the payment of a retirement annuity to each employee on the basis of his combined periods of service with any carriers subject to the Act.

9. Whether the Retirement Act interferes with the liberty of the carriers to contract with their employees with respect to wages.

10. Whether the Retirement Act is unconstitutional "under existing circumstances" by reason of the present financial condition of the carriers.

SUMMARY OF STATUTE INVOLVED AND LEGISLATIVE HISTORY

The Railroad Retirement Act (Act of June 27, 1934, c. 868, 48 Stat. 1283) is set forth in the Appendix (*infra*, pp. 157–170).

The Act sets up a retirement and annuity system for all employees of all carriers by railroad subject to the Interstate Commerce Act. The purposes of the Act, as stated in Section 2 (a), are to provide "adequately for the satisfactory retirement of aged employees", to promote "efficiency and safety in interstate transportation", and to make possible "greater employment opportunity

and more rapid advancement of employees in the service of carriers."[1]

The retirement and annuity system established by the Act applies to all persons employed by a carrier subject to the Act after its enactment, and also to all persons who were employed by such a carrier within one year before the enactment of the statute (Sec. 1 (b)). Retirement is made compulsory at the age of 65, but may be extended by written agreement between the carrier and employee for successive periods of one year each until the age of 70 (Sec. 4). Each employee who has attained the age of 65 (and who does not by agreement with his employer continue in service) is entitled to receive an annuity calculated by the application of specified graduated percentages of his average monthly compensation (excluding all over $300) to the number of years of his service, not exceeding 30 (Sec. 3). Any employee who has completed 30 years of service may retire before the age of 65, but in that event the annuity is reduced by one-fifteenth for each year that the employee is below the age of 65 (unless the retirement was due to physical or mental inability to continue in active service) (*Ibid.*). Any representative of an em-

[1] Section 2 (a) also provides: This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

ployee organization designated under the Railway Labor Act who has been in the service of a carrier is given the option of continuing or becoming a beneficiary under the Act provided that he contributes to the retirement fund sums equal to the employee and employer contributions (Secs. 1 (b), 7).

Funds necessary for the payment of annuities and for the expenses of administering the Act are to be raised by contributions from employees and carriers (Sec. 5). The contribution of employees is to be a certain percentage of their compensation and the contribution of each carrier twice the contribution of its employees (*Ibid.*). The Railroad Retirement Board set up to administer the Act may determine from time to time what percentage is necessary to provide the needed funds, but until the Board otherwise determines the employee contribution is to be 2% of compensation (*Ibid.*). Employee contributions are to be deducted by each carrier from the compensation of its employees and are to be paid by the carrier, together with its own contributions, into the Treasury of the United States quarterly, or at such other times as ordered by the Board (*Ibid.*). Moneys so paid into the Treasury are to be kept in a separate "railroad retirement fund" (Sec. 8).

The Board is given general authority to administer and enforce the Act, including power to require carriers and employees to furnish it necessary information and records and power to require

such advance payments by carriers as may be necessary to put the Act into operation (Sec. 9 (b)). The first quarterly payment under the Act was due November 1, 1934, and the first annuity payments thereunder are to begin February 1, 1935 (Secs. 1 (1), 3).

The Legislative History of the Retirement Act.— The legislative history of the Retirement Act dates back to February 1931, when the first bill embodying a compulsory retirement and pension plan for railways was introduced in Congress (S. 6196, by Senator Wesley Jones, 71st Cong., 3rd Sess.). In 1932 bills were introduced in the Senate by Senator Wagner and Senator Hatfield, and corresponding bills were introduced in the House by Representative Crosser and Representative Keller.[2] Hearings on the Wagner and Hatfield bills were held from January 11 to January 19, 1933.[3] In March 1934 Senators Hatfield and Wagner introduced a joint bill (S. 3231) upon which further hearings were held from April 23 to April 26.[4] On May 11,

[2] S. 3892 by Senator Wagner; S. 4646 by Senator Hatfield; H. R. 10023 by Representative Crosser; H. R. 9891 by Representative Keller, all introduced in the 72nd Cong., 1st Sess.

[3] Hearings before Subcommittee of Committee on Interstate Commerce, United States Senate, 72nd Cong., 2d Sess.

[4] Hearings before a Subcommittee of Committee on Interstate Commerce, United States Senate, 73rd Cong., 2d Sess. A bill introduced in the House by Representative Crosser was given a hearing before the House Interstate Commerce Committee on June 8, 1934. Hearing before Interstate Commerce Committee, House of Representatives, 73d Cong., 2d Sess.

1934, the bill as amended was favorably reported to the Senate, the Committee Report (Senate Report No. 974, 73rd Cong., 2nd Sess.) stating among other things (pp. 1–2, 4):

> It is obvious that retirement of any considerable number of the older employees will make possible greater employment opportunity and will tend to promote efficiency and safety in interstate transportation.
>
> * * * * *
>
> The record shows that there is now some form of retirement pension plan upon 90 percent of the railroad mileage in the United States. Such plans, however, are not by any means satisfactory either to the railroads or to railroad employees. In most part the pensions provided are inadequate and the cost to the railroads is mounting year by year. This plan contemplates the possibility of determining from the actual experience such fundamentals as are necessary to the construction of a sound reserve plan.
>
> * * * * *
>
> It is a question as to what extent, if any, the payment of pensions to aged employees actually increases operating costs.
>
> Without a satisfactory retirement system these aged employees are often continued in the service when it would be in the interest of economical operation to retire and pay them pensions.
>
> If it be good business judgment to replace worn-out and depreciated equipment with

> new and efficient equipment, it is equally in the interest of efficient and economical operation to retire those employees who have worn themselves out through long years of arduous toil in the performance of faithful service to the industry and thereby bring into the industry that proportion of younger and more active employees.
>
> If this be done, it will not only result in benefit to the industry, but will serve to extend to these aged employees the satisfaction of a well-earned reward which has been paid for by years of their devotion to the service.

The bill, S. 3231, as amended, was unanimously approved by the Senate in a record vote with 66 Senators voting; in addition 26 absent Senators were recorded as favoring the bill (Cong. Rec., Vol. 78, p. 11489). When reported out of conference, made necessary by disagreement between House and Senate bills, it was approved without record vote in both the Senate and the House, and was signed by the President on June 27, 1934 (Cong. Rec., Vol. 78, pp. 12001, 12160, 12455).

STATEMENT

This suit was instituted by respondents (134 Class I railroads, two express companies, and the Pullman Company) to test the constitutionality of the Railroad Retirement Act. The Railroad Retirement Board and the members thereof, petitioners here, were named as defendants. At the time

of filing the suit the Railroad Retirement Board had not yet commenced to function, and the administration of the Act by the Board was not in question.

Respondents filed their bill (R. 1), petitioners filed an answer (R. 22) which the court below said raised no serious issue of fact (R. 261), and the case came on for hearing in the Supreme Court of the District of Columbia on respondents' application for a temporary injunction (R. 261). By agreement of counsel the hearing was held upon affidavits, copies of which were exchanged by the parties prior to the hearing (R. 29).[5] At the conclusion of the hearing it was stipulated that the hearing should be the final hearing in the case (R. 261).

The decision below.—The court filed a memorandum opinion stating the conclusions which governed its decision (R. 261, 262). The court held that the Act exceeds the power of Congress because it applies to *all* of respondents' employees, "making no distinction between those [employees] engaged in interstate commerce and those not so engaged" (R. 263–264). It also held that the inclusion, in providing for the computation of annuities on the basis of years of service, of years of service rendered prior to the adoption of the Act consti-

[5] Numerous objections were filed by respondents to the affidavits presented by petitioners (R. 226–230), which objections were overruled, exceptions being noted (R. 153, 226).

tutes a taking of property without due process of law (R. 264). These provisions thus held invalid were held to be inseparable and incapable of elimination without destroying the entire scheme and purpose of the Act (R. 273). The court further held the Act invalid insofar as it applies to persons who had been employed within a year prior to its passage and who do not subsequently return to railroad service; but it held that this provision is separable and that its unconstitutionality does not impair the validity of the statute as a whole (R. 264, 273).

The court also made findings of fact and conclusions of law in pursuance of Equity Rule 70½ (R. 265, 273).[6] The final decree entered in the court below declared the Railroad Retirement Act unconstitutional and permanently enjoined petitioners from making any order or taking any other action designed to compel respondents to comply with the Act (R. 279).

The record.—The evidence will be stated and analyzed in the argument. At this point, however, it is desirable to indicate in a general way the character of the evidence contained in the record.

[6] The court adopted largely the proposed findings of fact submitted by respondents by indicating at the conclusion of each paragraph its approval thereof; such changes as were made by the court are indicated in the record (R. 265–273). The conclusions of law were made independently by the court (R. 273–274). The requests for conclusions of law filed by respondents are contained in the record at page 274 *et seq.*

Evidence for respondents.—Respondents' affidavits in chief (as distinguished from those in rebuttal) concern themselves to a substantial extent with figures and data intended to support the facts of a statistical nature alleged in the bill of complaint. Statistics are presented of railway employment in 1932, showing the number of employees at various ages (R. 30 *et seq.*, 60–61). Evidence is presented with respect to the number of employees over seventy years of age (R. 31, 56) and their distribution among the several respondents (R. 34); the number of employees having thirty years of service with individual carriers (R. 33); and the number of employees who left railroad service during the year preceding the enactment of the Act and who have not returned (R. 49, 58–59, 137–138). The number of persons annually discharged for cause is shown (R. 33), as well as the number of former railroad employees who have not been in the service within the year prior to the enactment of the Act (R. 139–140). Evidence relative to the comparative ages of railroad employees and official employee representatives is given (R. 45, 149), actuarial data concerning phases of the cost to the railroads of the Retirement Act (R. 130–132, 136–137), and evidence bearing upon the extent of superannuation among railroad employees (R. 133–136). One affidavit discusses the increased efficiency of the railroads in recent years (R. 72–75); the same affidavit and

another deal with increased safety in rail transportation in recent years (R. 75–76; 150–153).

Considerable evidence is devoted to showing the number of employees who, it is claimed, are not engaged in interstate commerce (R. 47, 58, 59). Ten of the respondents' affidavits concern themselves exclusively or largely with the description of 16 classes of railway employees who are claimed not to be engaged in interstate commerce (R. 62, 68, 71, 76, 93, 97, 100, 105, 109, 112). Two instances are given of employees engaged in the operation of coal mines owned by carriers (R. 115, 117); the character of the suburban passenger service of other carriers is indicated (R. 118, 120, 121, 123); and the ownership by certain carriers of securities, real estate, and so forth is shown, and that some employees are occupied in handling the same (R. 124, 125, 126, 128, 129).

Statistics are given tending to show that the respondents comprise substantially all the Class I carriers, and that the ratios of their employees, payrolls, and total operating revenues respectively to those of all railways are in each case in excess of 97 percent (R. 37).[1]

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[1] The text of the record giving the ratio of respondents' employees to those of all railroads as "93.7%" is a printer's error. The table on the same page gives the correct percentage as 97.3.

"* * * For the purposes of accounting for operating expenses, carriers operating steam railways shall be divided into three classes * * * Under Class I are included all

In support of the allegations of the bill of complaint with respect to alleged hardship, statistics are presented showing the number of railroads in the hands of receivers or trustees in bankruptcy (R. 35–37), railroad incomes, profits and losses (R. 38–40, 46), prospective increased labor and materials costs (R. 41, 42, 43–44, 141–143), and the extent to which freight and passenger traffic is handled by non-railway carriers (R. 44–45).

Evidence for petitioners.—Petitioners' affidavits are devoted mainly to describing pertinent conditions upon the railroads heretofore existing, to pointing out the inadequacies of the existing retirement and pension systems and the need for legislation such as that embodied in the Retirement Act. The essential facts are epitomized in the affidavit of Mr. Joseph B. Eastman, Federal Coordinator of Transportation, who concludes that a "compulsory, automatic, and uniform retirement and pension system for the whole railway industry is in my opinion desirable" (R. 153, 155).

The affidavit of Mr. Murray W. Latimer (R. 162), Chairman of the Retirement Board and one of the petitioners in this case, discusses the history and causes of old-age dependency (R. 163–168),

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carriers having annual operating revenues above $1,000,000 * * * The classification of the carriers shall be based upon their operating revenues for the latest completed fiscal year * * *" Interstate Commerce Commission, *Condensed Classification of Operating Expenses of Steam Roads*, Issue of 1914, p. 3.

the history of retirement and pension systems, among railways and in other industries, in foreign countries and in the United States (R. 168–172). He analyzes the existing voluntary railway pension systems to show their deficiencies (R. 172–180) and discusses pertinent provisions of the Railroad Retirement Act (R. 182 *et seq.*). This affidavit is supplemented by another affidavit of Mr. Latimer (R. 224–225) and by the affidavits of other persons familiar with railway labor conditions (R. 190, 192, 195, 198). Two affidavits present cost data based upon actuarial studies (R. 206, 214). Petitioners also presented two affidavits of labor executives, who dispute the contentions of respondents that the existing pension systems tend to promote employee loyalty (R. 221, 223). Petitioners also introduced in evidence a pamphlet dealing with the earnings and standard of living of railroad employees during the depression (R. 219); and a statement showing dividends declared by Class I railroads during the years 1913 to 1933 (R. 221).

Rebuttal evidence for respondents.—Respondents' rebuttal affidavits comprise an affidavit referring to negotiations dealing with the settlement of the last wage controversy between the railways and their employees and discussions between the railways and employees with respect to retirement legislation (R. 230–233); an affidavit of a physician for one of the railways relative to the practice of that railroad to make periodical physical exami-

nations of its employees (R. 233); and fourteen affidavits of presidents and other high executives of the respondents stating that only very limited benefits were derived from the existing voluntary pension systems and expressing the view that the Railroad Retirement Act will be destructive of these benefits (R. 235–260).

SPECIFICATION OF ERRORS TO BE URGED

Petitioners will rely upon each of the errors assigned in support of their appeal from the final decree entered in the trial court (R. 280–281).

SUMMARY OF ARGUMENT

I

PURPOSES OF RETIREMENT PLANS IN GENERAL

(A) *Summary of development.*—In almost all countries, railroads have been the first to provide for old-age pensions for their employees. Railway pension plans were adopted later in this country than abroad, but by 1927 railroads in the United States employing approximately 82.4% of all railway employees had voluntary pension systems. The adoption of such systems extended rapidly into other industries, until in 1932 some 420 companies employing about 4,000,000 persons had pension systems in operation.

(B) *Motives in adoption of retirement plans.*—Retention of superannuated workers in the service is detrimental to the efficiency of industry. Not only does the employee's own output suffer by rea-

son of old age, but in highly organized industries the declining activity of particular employees causes the slowing down of the work of the entire force. The retention of older workers also blocks the path to the promotion of younger workers and impairs their morale. Humane reasons, and the danger of incurring the resentment of employees and of the public, have prevented employers from turning out, without means of support, aged employees who have become inefficient. This situation is largely responsible for the adoption of pension plans. While employers have not always emphasized the same advantages, an analysis of the motives underlying the adoption of pension plans discloses the tendency to emphasize to an increasing extent the elimination of waste and the promotion of efficiency and economy. Experts and prominent organizations representative of large business interests have urged the adoption of pension plans as an aid to the profitable and efficient conduct of business enterprises. National, state, and local governments have also recognized the need for, and the beneficial effects of, retirement and pension systems, in the interest of promoting efficiency and economy. Courts which have been presented with the issue have justified retirement and pension systems on the same grounds. In the light of the history of the development of retirement and pension systems, Congress was justified in viewing such systems as a means of promoting efficiency and economy.

II

THE RETIREMENT ACT CALCULATED TO PROMOTE EFFICIENCY AND SAFETY AND TO IMPROVE LABOR CONDITIONS AND RELATIONS

(A) *Need for a sound compulsory railroad retirement system.*—The Retirement Act is calculated to overcome the inadequacies of existing railroad pension plans which have prevented those plans from accomplishing the objectives of sound retirement systems. The inadequacies of the existing plans, brought to the attention of Congress by the employees, were fully revealed in studies made under the supervision of the Federal Coordinator of Transportation. The outstanding respects in which the carrier plans have been found to be defective are the following: (1) Due principally to requirements of continuity of service, the carrier systems have largely failed to provide employees with old-age security. Under them, few employees become eligible for pensions. (2) The amounts of pensions paid under the carrier plans have not been adequate. Twenty-five percent of the pensions in force on December 31, 1933, called for the payment of less than $30 per month. (3) Due to their continuity of service requirements, the existing pension plans operate to discriminate against the lower-paid classes of employees, among whom labor turnover is greatest, with respect to the probability of securing annuities. (4) The present plans, for similar reasons, also discriminate

against the lower-paid classes, with respect to the amount of annuity received upon retirement. (5) Under existing railroad pension plans, no enforceable rights are conferred upon the employees. Employees thus have no assurance that, even if they ultimately satisfy the eligibility requirements, they will be retired on pension, or that, if retired on pension, their annuities will not be discontinued or diminished. The number of retirements on pension has in fact diminished from year to year during the past several years, and reductions have been made in the amount of annuities paid to pensioners. (6) The carriers have failed to maintain reserve funds to insure their ability to pay pension costs; their practice is to charge pension payments against operating expenses each year as the payments are made. (7) Finally and of first importance, the existing carrier plans have failed to eliminate the great amount of superannuation which exists in railroad personnel.

(B) *Effect of the Railroad Retirement Act.*— By way of contrast with the voluntary railroad pension systems, the system established by the Retirement Act provides assurance to the employees of old age security. The elimination in the Retirement Act of the requirement of continuity of service removes the basic reason why few pensions may be earned under the existing systems. It also removes the factor which has tended to bring about the discrimination in favor of higher paid

classes as against the lower paid classes of employees with respect to both (1) the likelihood of obtaining any pension, and (2) the amount of annuity received. Also the amounts of annuities received under the Retirement Act are likely to be greater than those under the existing pension systems. The fixing of the normal retirement age under the Act at 65, as compared with 70 under the existing carrier pension systems, will do much to remove the superannuation now existing in the industry. On the whole, the Retirement Act embodies the principles which are generally regarded as being essential to a sound retirement and pension plan; it may be expected to promote economy and improve employee morale, and promote the efficiency and safety of interstate transportation.

If there is a substantial basis for the judgment of Congress with respect to the need for, and the likely effect of, the Act (as there is in this case), its action will not be held to be arbitrary. *Radice* v. *New York*, 264 U. S. 292, 294–295. That the benefits which respondents expected to derive from their voluntary pension plans (said to be (1) greater continuity of service, and (2) improved employee loyalty) differ from those emphasized in the Retirement Act does not affect the Act's validity, so long as it is calculated in other ways to promote efficiency and safety. The Retirement Act is based upon a fundamentally different conception from that which appears to underlie the carriers' volun-

tary pension plans. Whereas, the carriers seem to have regarded the pension as a gratuity in the nature of a reward for long, unbroken service, the Retirement Act emphasizes the systematic removal of superannuated workers and the improvement of employee morale and efficiency through providing definite assurance of old age security, and opening of paths to promotion and advancement. This is in accord with the current viewpoint regarding the most desirable objectives of pension plans.

III

THE PURPOSE OF THE ACT AS STATED THEREIN

It is clear from the mere examination of the Retirement Act that it was not adopted by Congress as a pretext for the accomplishment of unauthorized purposes. *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Company*, 259 U. S. 20, have no application. The Act sets up a retirement and pension system which will be sound and adequate, and which Congress reasonably believed will lead to increased efficiency and safety in interstate transportation. The purposes indicated in the Act of providing for the satisfactory retirement of aged employees and of making possible more rapid advancement of employees; and the reference in Section 2 (a) to the "payment of annuities for relief of superannuated employees", are "not ends in and of themselves but means to the legitimate end of" promoting efficiency and safety in

interstate transportation. Compare, *Stephenson* v. *Binford*, 287 U. S. 251, 272. The relief of unemployment is not one of the chief aims of the Act. Compare *Arizona* v. *California*, 283 U. S. 423; *Smith* v. *Kansas City Title Company*, 255 U. S. 180. The reference to unemployment relief, in Section 2 (a) is but the expression of the hope that through the Act some such relief may incidentally be provided. *Ann Arbor Railroad Co.* v. *United States*, 281 U. S. 658, 668-669.

IV

POWER OF CONGRESS

Congress is authorized to enact a compulsory retirement and pension law applicable to interstate carriers in the interest of promoting efficiency and safety in interstate transportation, of improving labor conditions and relations, and of "fostering" and "protecting" the national transportation system. This is clear from the decisions of this Court defining the scope of the commerce power of Congress. Also, a brief survey of the "minutely detailed supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce" (*Wolff Packing Company* v. *Court of Industrial Relations*, 262 U. S. 522, 543), demonstrates how clearly the Retirement Act falls within the scope of the commerce power. Numerous cases decided since the enactment of Transportation Act,

1920, disclose that concern for the preservation, promotion, and protection of the national transportation system has required the extension of Federal "guardianship and control" beyond matters of interstate rates alone, to matters which previously might have been left unregulated or subject to State regulation. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474; *United States* v. *Louisiana*, 290 U. S. 70, 75; *Wisconsin R. R. Commission* v. *Chicago, Burlington & Quincy R. R.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184, 190; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478; *Transit Commission* v. *United States*, 284 U. S. 360; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 479; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe*, 270 U. S. 266, 277; *Alabama & Vicksburg Ry. Co.* v. *Jackson and Eastern Ry. Co.*, 271 U. S. 244; *Chicago Junction Case*, 264 U. S. 258; *Texas* v. *United States*, 292 U. S. 522. The broad scope of the authority of Congress in the field of labor conditions and relations is evidenced by the numerous enactments of Congress in this field, which have met with the approval of this Court. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas and Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33 (safety appliance acts); *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612 (hours of service); *Wilson* v. *New*, 243 U. S. 332 (wages during emergency); *Texas & New Or-*

leans R. R. Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 (labor relations).

The Emergency Railroad Transportation Act of 1933, which this Court said confirms and carries forward the Transportation Act, 1920 (*Texas* v. *United States*, 292 U. S. 522, 530; *Florida* v. *United States*, 292 U. S. 1, 8), directs the Federal Coordinator of Transportation (Section 13) to investigate and consider means "of improving transportation systems throughout the country * * * including, also, the stability of railroad labor employment and other improvement of railroad labor conditions and relations." This shows beyond question the existence in the mind of Congress of a need for improvement in railroad labor conditions and relations. Approximately 60 percent of all operating expenses of interstate carriers are expended as direct labor costs. The power of Congress is not limited to the improvement of the physical facilities of the carriers, but Congress may deal also with the employees, who compose an important element of the national transportation system. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618–619.

V

APPLICATION TO ALL EMPLOYEES OF INTERSTATE CARRIERS

The Court below found that 211,107, or nearly one-fifth of all respondents' employees, earning annually not less than $300,000,000, were not engaged

in interstate commerce or transportation. It held, relying upon *The Employers' Liability Cases*, 207 U. S. 463, that the inclusion of these employees under the Act rendered it wholly unconstitutional.

The lower court's classification of employees not engaged in interstate commerce or transportation, based presumably upon decisions under the Federal Employers' Liability Act, may be disregarded, since this Court has said that that Act does not mark the limits of the power of Congress under the Commerce Clause, *Illinois Central R. R. Company* v. *Behrens*, 233 U. S. 473, 477. No showing is made that the 211,107 employees referred to are not engaged in the transportation business of respondents or that their efficiency does not affect the efficiency of the national transportation system.

However, *The Employers' Liability Cases* do not hold that Congress lacks power to enact legislation applying to employees not directly engaged in interstate commerce. This is apparent from the numerous subsequent decisions of this Court sustaining legislation applicable to employees engaged in interstate commerce and to employees generally. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas & Pacific Railway* v. *Rigsby*, 241 U. S. 33; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548. The latter case involved the validity of the Railway Labor Act, which applied, as does the Retirement Act, to railway employees generally.

The question must be decided on the basis of the facts in each case, by reference to the purposes sought to be accomplished by the legislation in question and by determination whether the inclusion of the employees in question is reasonably necessary in order to effect these purposes. *Minnesota Rate Cases*, 230 U. S. 352, 399; *Stafford* v. *Wallace*, 258 U. S. 495, 515–516; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420. Similar principles have been applied to sustain the validity of the various provisions of the Transportation Act, 1920, and related subsequent legislation wherein Congress has acted in the interest of assuring to this country an adequate national system of transportation. *Transit Commission* v. *United States*, 284 U. S. 360, *supra*; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans Railroad Co.* v. *Northside Belt Railway Co.*, 276 U. S. 475, 479, *supra*; *Pittsburgh & W. Va. Railway Co.* v. *Interstate Commerce Commission*, 293 Fed. 1001; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, *supra*; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, *supra*; *Transit Commission* v. *United States*, 289 U. S. 121; *Texas* v. *United States*, 292 U. S. 522. It seems inconsistent that Federal supervision of abandonments of intrastate lines of interstate carriers (involving comparatively insubstantial burdens upon interstate commerce, *Transit*

Commission v. *United States,* 284 U. S. 360) is necessary to insure the efficient operation of the industry, but that supervision of one-fifth of the entire personnel (receiving as annual compensation not less than $300,000,000) is not equally necessary for the same purpose. The fact that legislation commencing with Title III of the Transportation Act, 1920, regulating railroad labor relations has applied to interstate carrier employees generally, and has nevertheless been sustained by this Court, indicates that Congress lawfully included all employees under the Retirement Act. *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U. S. 72; *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548. Furthermore, there are practical considerations, arising principally from the fact that employees shift from time to time between tasks in interstate and intrastate commerce, and that the two are often indistinguishable, which should lead the Court to refuse to hold that the Act may apply only to employees whose work is directly in interstate commerce. *Long Island R. R. Co.* v. *Department of Labor of the State of New York,* 256 N. Y. 498.

VI

MEASUREMENT OF ANNUITIES

The ruling of the lower court—that the requirement of the Act with respect to the payment of annuities on the basis of years of service, including

years of service rendered prior to the Act, requires respondents to "contribute huge sums of money to be devoted to the payment of pensions or annuities based upon service long since completed and fully paid for" and, therefore, takes their property without due process of law—indicates that the court failed to take account of the purpose of the annuity payments and misapprehended the role of prior service in determining the amounts of annuity payments. The pension is not an additional payment for past services but is an expenditure for a present and future benefit through improvement of the personnel of the carriers.

If Congress is authorized, in the interest of improving the national transportation system, to provide for the compulsory retirement and pensioning of superannuated workers, clearly the manner in which the amount of annuities shall be determined rests in its sound discretion. Measurement of annuities according to years of service is eminently fair to the carriers. The fact that the Act draws upon past facts, i. e., years of service prior to the Act, for the calculation of annuities does not render the statute retroactive. *Cox* v. *Hart*, 260 U. S. 427, 435; *Hawker* v. *New York*, 170 U. S. 189. The payment of pensions under State pension laws has been several times sustained, although the service periods of the pensioners in part antedated the laws, in the face of express constitutional prohibitions against the payment of additional compensation for services previously rendered and paid for.

The fact that persons previously in the employ of the carriers who are reemployed subsequent to the passage of the Act will receive credit toward their pensions for services rendered in the past is, in the light of the pertinent circumstances, not unreasonable. Nor is it unreasonable to provide for the payment of pensions to persons who are required to retire forthwith, and who will not contribute any substantial sums toward the costs of their annuities.

VII

INCLUSION OF PERSONS IN THE SERVICE WITHIN A YEAR PRIOR TO THE ACT

The court below held unconstitutional the provision which includes as employees under the Act persons who were in the service of the carriers within one year before the adoption of the Act. The considerations which led Congress to include these employees appear in the legislative history of the Act. It is the practice of the railroad industry to grant employees who have been furloughed so-called "prior reemployment rights", i. e., the last employee removed from the pay roll is the first to be recalled to service when a vacancy occurs; and the names of these employees are kept on seniority lists. In addition, in order to fill unexpected vacancies, a number of employees are kept upon "extra" or "call" lists and are subject to call at all times and hold themselves in readiness for railroad service in preference to securing

other employment. Both groups are commonly regarded, and regard themselves, as railroad employees, and they were included as employees in the early drafts of the Act. Because the period of time during which the names of employees are listed as retaining their seniority rights or are continued on the call lists varies with the different carriers, and for reasons of fairness, it was decided to include within the Act all employees who had been in the service during the year preceding passage of the Act, the one year period being taken as a reasonable approximation of the usual duration of employment rights. Under the circumstances, the inclusion of the employees in question was not unreasonable.

VIII

OTHER CONTENTIONS OF RESPONDENTS

None of the other provisions of the Act attacked by respondents is unreasonable or otherwise unlawful.

1. *Payment of annuities to persons who have left the service prior to the retirement age.*—The Act provides that annuities shall be payable to employees at age 65 even though they do not continue in the service until that age, the amounts of annuities being determined, of course, by length of actual service. In the absence of such provision, employees who were laid off or discharged, even though this occurred on the very eve of retirement,

would lose their pension rights. The purpose of the provision in question is to provide assurance of old-age security. Such provision is reasonable, not because of its effect upon employees after they have left the service but because it improves the morale of employees while they are in service.

2. *Optional retirement after 30 years' service.*—Under the Act any employee after a service period of 30 years is entitled to retire before age 65 with reduced annuity. The justification for this provision is that employees who have completed 30 years of service may find it necessary, and it may be in the interest of the industry, for them to retire before age 65. The reduced amount of annuity in the case of retirement before age 65 may be expected to discourage such retirements unless they are reasonably necessary.

3. *Inclusion of employee representatives.*—Under the Act official representatives of employee organizations who have previously been in the service of a carrier are given the option of becoming, or continuing to be, beneficiaries under the provisions of the Act, provided that they pay both employee and carrier contributions. The inclusion of employee representatives does not burden the retirement fund. In any case, the inclusion of employee representatives is reasonably necessary if the policies of the Railway Labor Act are not to be defeated; railway employees might be loath to surrender their rights under the Retirement Act in order to become employee representatives.

4. *"Pooling" of "funds and affairs".*—Because the Act provides for the payment of all contributions into a common fund; and because the amounts of annuities are made to depend on the service periods of the employees, time spent in the service of any carrier being made part of an employee's service period, respondents contend that there is an improper "mingling" and "pooling" of their "affairs and funds" and the service periods of their employees. There can be no objection to the mere establishment of a common fund from which annuities are to be paid. Respondents' objection is, rather, that the Act prescribes an improper measure for determining carrier contributions to the fund.

The adoption of an industry-wide retirement and pension system is justifiable in the interest of improving the national transportation system. The efficiency of each part of the system is necessary to the efficiency of the system as a whole. *Colorado* v. *United States,* 271 U. S. 153, 164. Since the railroads, as well as the public, have a common interest in the efficient performance of the transportation system as a whole, it cannot matter that superannuated employees are unevenly distributed among them at the present time, or that the age classifications or average service periods of employees may differ with different carriers. The fact is, moreover, that there is strong evidence of the absence of any substantial differences between the age clas-

sifications and average service periods of the employees of the different carriers, so that in the long run it is not unlikely that costs under the Retirement Act will be distributed among the carriers very nearly in proportion to the annuities paid to their respective employees.

The legality of the pooling principle when reasonably applied is well settled. *Mountain Timber Company* v. *Washington*, 243 U. S. 219; *Thornton* v. *Duffy*, 254 U. S. 361; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456; *Atlantic Coast Line Railroad Company* v. *Riverside Mills*, 219 U. S. 186.

IX

CARRIERS' LIBERTY OF CONTRACT

The Retirement Act does not interfere with the right of the carriers to contract with their employees with reference to wages. *Adkins* v. *Children's Hospital*, 261 U. S. 525, is not applicable. The Retirement Act does not, either directly or indirectly, fix the amount of wages to be paid by respondents.

X

PRESENT FINANCIAL CONDITION OF CARRIERS

Enactment of the Retirement Act at this time is not unreasonable by reason of the present financial condition of the carriers. No case has been found in which a regulation (other than rate regulation),

otherwise valid, was held invalid because of the complaint that the plaintiff could not bear the cost. In any event, respondents' reliance upon conditions during the depression years is misleading. It cannot matter whether the earnings of the carriers during the past 2 or 3 years have been low, unless it is to be assumed that the years in question are typical of those during which the Act will apply. It is common knowledge that with improvement in economic conditions net revenues of the railroads tend to improve rapidly, due to the fact that great quantities of additional traffic can be handled with comparatively little increase of facilities. There is no reason to believe, therefore, that the carriers will not be able in normal years to pay the costs of the Retirement Act. It may not be assumed, either, that the contributions of the carriers to the retirement fund, even at the outset, represent the net cost of the Act to the carriers. Actual savings in pay rolls will undoubtedly result from the Act, in addition to the intangible benefits that will accrue to the carriers. Furthermore, the Retirement Act must be considered in connection with the Emergency Transportation Act of 1933, and in connection with the entire Congressional program for the rehabilitation of the railroads.

ARGUMENT

In the view of the Government the Railroad Retirement Act is intended, and is reasonably calcu-

lated, to promote efficiency and safety, to improve labor conditions and relations, and to foster and protect the national transportation system. In the court below, respondents took the position that the Act is neither intended nor calculated to accomplish these objectives. The true purposes of the Act, they contended, were to provide relief against unemployment and to confer gratuities upon the employees of the carriers. The court below was not persuaded by these contentions of respondents, as indicated in its opinion (R. 262–263). However, since respondents have expressed an intention to renew these contentions in this court, and because a consideration of the meaning and purpose of the Act as a whole will be helpful toward a proper understanding of the other questions in the case, the purposes of the Act will be discussed prior to consideration of the questions presented in the petition for certiorari.

As will appear, the Railroad Retirement Act, although it embodies the first compulsory retirement and pension plan enacted in this country, is but the development of voluntary plans which have been in use in this country, particularly among the railroads, for more than a third of a century. It is essential to a proper understanding of the Retirement Act to consider the development of pension systems and to know what they have accomplished and were intended to accomplish. The first

section of this brief will, therefore, be devoted to showing that industrial pensions, prior to the Retirement Act, were coming into increasingly widespread use and that they were being adopted by employers primarily for the purpose of promoting efficiency and economy through the humane and systematic removal of superannuated employees and the substitution of young and efficient workers, with consequent improvement of the morale of the entire personnel.

The second section will point out inadequacies of present railway pension plans, and will show the need for a sound system calculated to promote efficiency, economy, and safety in interstate transportation, and that the Retirement Act is calculated to accomplish these purposes. The third section will treat briefly the contentions of respondents with respect to the statement of purposes contained in Section 2 (a) of the Act. The fourth section will show, by reference to the pertinent authorities, that it is within the power of Congress to enact a compulsory retirement and pension plan applicable to interstate carriers. The bearing of *The Employers' Liability Cases* on the application of the Act to *all* employees of the carriers will be considered separately. The remaining questions presented in the petition for certiorari and other contentions raised in the bill of complaint will be treated in subsequent sections of the brief.

I

THE PRINCIPAL PURPOSE OF SOUND INDUSTRIAL RETIREMENT AND PENSION PLANS IN GENERAL IS TO PROMOTE EFFICIENCY AND ECONOMY

A. Summary of the Development of Industrial Pension Plans

The Retirement Act is the developed product of many years of experience with industrial pension plans. It does not introduce a retirement and pension system into the railroad industry, but is a development of the voluntary systems already in effect in the industry.

It is significant that in almost all countries railroads have been the first to provide old-age pensions for their employees (R. 169). This has undoubtedly been due, first, to the fact that railroading was among the first of the industries in which individual units attained great size, and, second, to the fact that, railroading being one of the oldest industries, there has been a tendency toward an increased age level of its employees (*Ibid.*). The first voluntary pension systems on railways appeared in European countries around the middle of the last century: Belgium, 1845; Netherlands, 1845; Great Britain, 1853; France, 1856; Russia, 1858; Denmark, 1859; Italy, 1862; Sweden, 1868; Portugal, 1877; Norway, 1890 (R. 170). By 1890 pension systems for railway employees covered substantially all Europe (*Ibid.*). In Canada the first

railway pension plan was established in 1874 and in the United States in 1884 (*Ibid.*).

In this country, progress at the outset was slow, but by 1910 railroads employing approximately fifty percent of all railway employees had formal pension plans (*Ibid.*). This percentage increased to 82.4 in 1927 and remained substantially the same until the enactment of the Retirement Act (*Ibid.*).

Other industries followed quickly in the footsteps of the railroads and pension systems came to be adopted in the United States by public utilities, banks and insurance companies, and large corporations in the manufacturing industries. Latimer, *Industrial Pension Systems,* Vol. I, pp. 35–43; Vol. II, pp. 842–843.* In 1932, some 430 companies, employing normally about four million persons, had pension systems in operation (*Ibid.,* Vol. II, p. 893). Approximately 140,000 persons were receiv-

* In this and other parts of the brief, citations are made to material not included in the record. Such material, in addition to House and Senate Reports and hearings before Senate and House committees, consists of texts and other reliable sources of information pertaining to retirement and pension systems. Some of the latter sources were referred to in the House and Senate Committee hearings. Petitioners believe that the material referred to in this brief may properly be considered by the Court, in considering the constitutional questions presented. See *Muller* v. *Oregon*, 208 U. S. 412, 419; *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 16; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 422, 444; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 10–15; *Nebbia* v. *New York*, 291 U. S. 502; *Burns Baking Company* v. *Bryan*, 264 U. S. 504, 514, 519; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 9–10.

ing pensions to the amount of $100,000,000 annually (*Ibid.*).[9]

The increasing extent to which pension plans have been voluntarily adopted would seem to indicate clearly that employers regard it as good business policy to retire and pension their superannuated employees systematically. Further analysis will show that the dominant motives underlying the adoption of pension plans have come to be those of efficiency and economy.

B. Motives Underlying Adoption of Voluntary Pension Plans

The essence of an industrial retirement and pension system is, of course, the retirement from industry of employees who have reached a stated age, and the payment to them of allowances for their support thereafter until death. In its latter aspect it has much in common with plans for the relief of old age dependency. However, neither in origin nor in its present development is the industrial pension merely an old age relief measure. On the contrary, "industrial pension systems make no pretense of being aimed at general relief of old age dependency." Latimer, *op. cit.*, Vol. I, p. 4. It is noteworthy that workers have taken no part in

[9] During the time when the railroads of this country were adopting their voluntary pension plans, compulsory railroad pension plans were being enacted into law in foreign countries: France, 1909; Argentine, 1919; Brazil, 1923. Bulletin of U. S. Labor Statistics No. 561 (1932), *Public Old Age Pensions and Insurance in the United States and Foreign Countries*, pp. 99, 143, 155, 162, 193.

securing the adoption of industrial pension plans. "In the United States, organized labor has been apathetic and in some part even hostile to the adoption of voluntary pension systems" (R. 171). The fact is that the industrial pension was adopted by employers themselves as a business solution of an industrial problem.

The problem which the industrial pension plan is designed to solve is plain. Industry imposes rigorous demands upon the physical and nervous powers of workers. These powers are also subject to the inevitable impairment of age. Retention in service of superannuated workers whose powers have become impaired, just as the retention in service of worn or obsolete equipment, is detrimental to efficiency. Not only does the employee's own output suffer by reason of old age, but in a highly organized industry the declining activity of particular employees causes a general slowing down, a lag in the work of the entire force. The retention of the older workers, moreover, blocks the path to advancement of younger workers, and results in discontent and impairment of their morale. Obviously, also, the safety, not only of the older employees themselves, but also of others affected by their conduct, may be endangered with consequent cost to the industry.

Humane reasons alone prevent the discharge of superannuated workers without provision for their support. Deterrents also are the dangers, injurious to business, of incurring public resentment, as

well as resentment of the remainder of the staff. In the absence of some form of pension, such employees are retained at the expense of efficiency. Sometimes they are shifted to sinecure jobs created for them; sometimes they are kept on the payroll but relieved of their duties.[10] Such a policy, i. e., treatment of the problem on an individual basis, must necessarily be a burden upon executives charged with its execution. The necessities of this situation are largely responsible for the adoption of industrial pension plans.

It is true that the dominant reasons which have led to the use of pensions have not been the same with all employers and at all times. Some employers saw in the industrial pension plan a device for avoiding labor disputes and strikes. This is said by two railway officials whose affidavits were filed by respondents in this case to have been among the reasons motivating the adoption of pensions

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[10] A special committee of the United States Chamber of Commerce reported:

"The employer who is considering the adoption of an annuity plan * * * should balance the cost of annuities against the benefits which he expects to derive and against the cost of alternative measures, of which the most common is the retention of superannuated employees beyond the ages at which their services are profitable.

"Theoretically, there is another expedient; the discharge of old employees without any provision for their support. Few corporations or other employers find it desirable to resort to this method. Unfavorable reactions from the public and from employees are likely to more than offset any savings thereby effected. *Employees' Retirement Annuities*, U. S. Chamber of Commerce, 1932, p. 5.

on some roads (R. 236, 256). Other employers hoped that the adoption of industrial pension plans would instill in their employees a feeling of loyalty and would encourage greater continuity of service, thus reducing labor turn-over. A number of executives of respondents have stated in affidavits filed in this case that the promotion of loyalty and continuity of service were the sole objectives which motivated them in the adoption of their pension plans. (See *infra*, pp. 73–74.) It is clear, however, that in recent years the emphasis has been, to an increasing extent, upon the elimination of waste and upon the promotion of efficiency and economy through the systematic elimination of workers who have become too old to work efficiently.

These observations are borne out by highly authoritative sources. Mr. Latimer, who has conducted the most comprehensive study that has been made of industrial pension plans (*Industrial Pension Systems*, 1931) and who today is probably the outstanding authority in this field (R. 162–163), traces the trend of reasons for the adoption of industrial pensions in this country as follows (R. 170):

> Employers thought the payment of pensions to be good business management because it would bring public approval and more business. They hoped that the payment of pensions would improve the morale of their employees and bring increased

loyalty to the employer. This improved morale and increased loyalty would, in turn, it was thought, prevent strikes and other labor disturbances. With the increasing recognition of the costs involved in the retention in service of superannuated employees, attention was directed to more tangible advantages. It was recognized that superannuated employees not only lost in their own efficiency but placed a drag upon the entire organization of which they were interdependent units and blocked promotions, with consequent improvements, all along the line of the organization. *Automatic retirement of superannuated employees under pension systems was expected to improve efficiency, remove the drag, and open up opportunities for promotion, leading, in turn, to increased efficiency and improved employee morale.* (Italics supplied.)"

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[11] See also: "In addition to hurting corporate good will, impairing friendly relations with workers, and shaking the confidence of labor in the good faith of capital, the failure of the pension idea would also deprive corporate management of an important administrative device for freeing their pay rolls of the ruinously expensive burden of aged and under-efficient employees. Experience has shown conclusively that the presence of such employees in active personnel only serves to slow down the whole industrial machine and raise production costs. A fundamental and purely practical consideration of established pension plans was that it would be cheaper to pension aged employees than to keep them at work." Edwards, *Industrial Pension Plans Collapsing*, 1925, The Annalist, Vol. 26, p. 637.

Prominent organizations representative of large business interests have unqualifiedly urged the adoption of pension plans in order to promote economy and efficiency, and as being in the interest of industry as well as the public generally. In a resolution adopted at the 20th annual meeting of the Chamber of Commerce of the United States in 1932 it was stated (*Employees' Retirement Annuities,* Chamber of Commerce of the United States, 1932):

> Retirement for superannuated employees of long service on annuities is an aid to the profitable administration of business enterprises. The advantages to employers, to employees, and to the public are obvious.

In the accompanying special committee report upon which this resolution was based, the following recommendations, among others, were made to the members of the Chamber (pp. 7–8):

> 1. Regard for the personal interests of their employees, for the welfare of society in general, and *for efficient administration of their own enterprises* should prompt employers to develop some method for aiding in providing for the financial security of their superannuated employees.
>
> 2. The retirement of superannuated employees of long service on annuities *is an aid to the profitable and efficient administration of business enterprises* and is advantageous to employers, to employees and to the public. * * * (Italics supplied.)

In a study entitled, *Elements of Industrial Pension Plans,* published in 1931, the National Industrial Conference Board, Inc., closely associated with business organizations, presents an intensive analysis of the trend of employer thought with respect to pension plans.[12] After pointing out (p. 6) that in the beginning the humanitarian motive for the adoption of industrial pension plans was dominant, the Conference Board states (p. 8) that eventually the conception of industrial pensions as dictated and justified by economic expediency took definite shape in the minds of employers. "It came to be recognized", the Board states (p. 8), "that the fundamental raison d'etre of the pension system is to be found in the concrete fact that it increases efficiency and lowers costs." Expanding upon this statement, the Board continues (p. 8):

> Realization of the economic benefits of the pension plan could not, of course, come about until practical experience had demonstrated those advantages. As the economic effects of old-age pensions gradually

[12] The following statement appears in the preface to the study (p. VII): "In the preparation of its studies, the National Industrial Conference Board avails itself of the experience and judgment of the business executives who compose its membership, and of recognized authorities in special fields, in addition to the scientific knowledge and equipment of its Research Staff. The publications of the Conference Board thus finally represent the result of scientific investigation and broad business experience, and the conclusions expressed therein are those of the Conference Board as a body."

> revealed themselves, employers began to perceive that a well-ordered retirement plan may be a paying business proposition. The savings under such a plan, through elimination of waste, and the gains from stimulus to efficiency, were found to be sufficient in most cases to cover the necessary outlay. The pension plan won wide recognition as a practical economic solution of the problem of industrial superannuation.[13]

The Conference Board points out (p. 8) that employee obsolescence has become accelerated by reason of the quickening pace of modern machine industry, bringing about the necessity of retirement of workers at an earlier average age. Stating that these conditions make increasingly urgent the

[13] Analyzing the economic advantages of pension plans, the Board states in part (p. 10): "In addition to the immediate savings through elimination of waste, the pension plan brings further gain through stimulation of efficiency: (1) by quickening the pace of the younger workers now relieved of the drag of older employees with impaired working capacity; (2) by opening the way to promotion all along the line, especially at the start of the pension plan; and (3) by improving in various ways the plant morale. More specifically, the efficiency of the individual workers is stimulated by the feeling of security and hopefulness that results when the individual is relieved of the fear of destitution and dependency in old age and by the sentiment of loyalty and good will fostered by the pension plan, which thus operates as a spur to the ambition of the worker and incites him to more intensive and sustained effort. Similarly, the efficiency of the organization as a whole is increased by the improvement of industrial relations, the development of a cooperative spirit, and the promotion of constancy and continuity of employment."

problem of industrial superannuation, the Board adds (p. 8):

> Also the growing intensity of competition, necessitating closer attention to economies in plant organization and personnel administration, leads thoughtful employers to consider the adoption of a pension plan as a measure of economy.

These findings of representative groups of large business interests, based upon experience and careful study, would seem to indicate that the industrial pension plan may reasonably be considered as, essentially a device for the improvement of personnel, for the elimination of waste, and the promotion of efficiency, in the interest of industry and of the public.

Government retirement plans.—National, State, and local governments have recognized, with respect to the public service, the need for, and beneficial effects of, retirement and pension systems in the interest of promoting efficiency and economy. (See Comments, 44 Yale Law Journal 292, 296; and see also U. S. Department of Labor, *Public Service Retirement Systems,* Bureau of Labor Statistics, Bulletin No. 477, 1929.) For example, the most extensive governmental pension system, that applying to the Federal civil service, was aimed specifically at the elimination of waste and inefficiency, resulting from the retention in service of superannuated workers. The facts are disclosed in a report of a Committee of the House

of Representatives upon a bill to amend the Federal Retirement Act (House Report, No. 768, 69th Cong., 1st Sess.). Under the civil-service system, tenure in Federal employment tended to become permanent, as a result of which an increasing number of employees grew old in the service and became inefficient. "As most of the superannuates had been unable to make provision for their old age, it was practically impossible to induce the responsible heads of departments, bureaus, and divisions to dismiss them. * * * As a result there sprang into existence an unofficial pension system, unwarranted in law, and wasteful and extravagant in practice. This system consisted simply of retaining on the payroll all employees of long years of service, who, by reason of advanced age and its attendant infirmities, were no longer efficient or competent. * * * Full salaries were paid for little or no work. * * * Competent employees on the same piece of work were retarded by the incompetent" (p. 9). The report adds (p. 9) that it was this situation which led Congress, in 1920, to enact the Civil Service Retirement Act.[14]

[14] President Taft, in transmitting to Congress a report of the Commission on Economy and Efficiency, on the subject of a Federal Retirement Act, introduced his message to Congress with the statement that: "It is unnecessary at this time to discuss at length the necessity for adopting some plan by which the service may be relieved of the loss from inefficiency of the personnel caused by the retention on the rolls * * * of those who have passed the age when they can perform a full day's work." The report of the Committee shows that

State courts have recognized that retirement and pension systems promote efficiency and economy.[15] The cases have involved generally the question

its recommendation of a Federal retirement system was based purely upon the promotion of efficiency and economy. (See: House Document No. 732, 62nd Cong., 2nd Sess.; see also: House Report No. 394, 68th Cong., 1st Sess.)

[15] *Cobbs* v. *Home Insurance Company*, 18 Ala. App. 206, 208, 91 So., 627, 629 (1921) cert. denied 207 Ala. 712, 91 So. 922 (1921), by retaining in the service men of the most faithful and efficient class; *Home Insurance Company* v. *Cobbs*, 20 Ala. App. 491, 494, 103 So. 165, 168 (1925), by raising the standard and promoting the efficiency of the department; *Hughes* v. *Traeger*, 264 Ill. 612, 618, 106 N. E. 431, 433 (1914), by encouraging competent employees to remain in the service and by retiring from service those who have become incapacitated from performing the duties as well as they might be performed by young or more vigorous men; *People ex rel. Kroner* v. *Abbott*, 274 Ill. 380, 385, 113 N. E. 696, 698 (1916), the same; *DeWolf* v. *Bowley*, 355 Ill. 530, 533, 189 N. E. 893, 894 (1934), the same; *Elliott* v. *Fire Commissioner of City of Boston*, 245 Mass. 330, 331, 139 N. E. 523, 524 (1923), by eliminating the superannuated; *Fellows* v. *Connolly*, 193 Mich. 499, 512, 160 N. W. 581, 586 (1916), by inducing continued and efficient service; *Bowler* v. *Nagel*, 228 Mich. 434, 440, 200 N. W. 258, 260 (1924), by inducing continued and efficient service, pensions are justified as an economic proposition; *State ex rel. Haig* v. *Hauge*, 37 N. D. 583, 591, 164 N. W. 289, 291 (1917), by encouraging continued and efficient service; *State ex rel. Retirement Board* v. *Kurtz*, 110 Ohio 332, 343, 144 N. E. 120, 124 (1924), by improving the morale and the standard of the force; *Commonwealth of Pennsylvania* v. *Walton*, 182 Penn. 373, 377, 38 Atl. 790, 791 (1897), by securing and retaining the services of the most faithful and efficient class of men; *State ex rel. Dudgeon* v. *Levitan*, 181 Wis. 326, 330, 193 N. W. 499, 501 (1923), by encouraging a more devoted, contented, and continuous service. And see *Heinz* v. *National Bank*, 237 Fed. 942, 953 (C. C. A. 8th, 1916).

whether State or local governments could validly pay pensions in view of constitutional prohibitions against gratuities or against the payment of additional compensation after service is completed; or they have involved the question whether payments of pensions by private corporations were justifiable expenditures, and quite uniformly the decisions have sustained the expenditures on the ground that they were proper outlays in the interest of economy and efficiency.

In view of this history, development, and practice, Congress was clearly justified in viewing pension plans as means of promoting efficiency and economy.

II

THE RAILROAD RETIREMENT ACT IS REASONABLY CALCULATED TO PROMOTE EFFICIENCY AND SAFETY, TO IMPROVE LABOR CONDITIONS AND RELATIONS, AND TO "FOSTER" AND "PROTECT" THE NATIONAL TRANSPORTATION SYSTEM

The proof would seem to be conclusive that industrial pension plans are now intended primarily to promote efficiency and economy. It is not to be assumed, however, that voluntary pension plans have generally been successful in the accomplishment of this purpose. The effectiveness of particular plans depends upon the character of the scheme adopted. Particularly, the railroad pension plans have proved to be inadequate. Railway employees have been long dissatisfied with the existing railway pension plans, the matter becoming

of such concern that they finally brought it to the attention of Congress (R. 196). Large numbers of employees, not content to act through the standard railway labor organizations, combined to form the Railroad Employees' National Pension Association (*Ibid.*). Such intense employee dissatisfaction would, alone, seem indicative of the fact that the existing pension systems were defective. As will presently be shown, investigation under the supervision of the Federal Coordinator of Transportation has confirmed that the growing discontent with the present pension systems was justified.

The Railroad Retirement Act is calculated, as will be shown, to remove the great amount of superannuation now existing in the industry and to overcome the inadequacies of existing railway pension plans which have prevented those plans from accomplishing the objectives of sound retirement systems. A significant feature of the Retirement Act is, of course, its compulsory character. The absence of any enforceable rights in the employees, under the existing plans, is an outstanding weakness since the carriers are not bound to continue to make retirements and the employees have no definite assurance that they will ever be retired on pension, or, if pensioned, that their pensions will continue. The present railway pension plans are defective in numerous other respects. The facts are fully set out in the affidavits filed by petitioners, particularly the affidavits of Mr. Joseph B. Eastman, Fed-

eral Coordinator of Transportation, and members of his staff who have been conducting a study of conditions as they existed prior to the Railroad Retirement Act.[16]

Commenting upon the existing carrier pension plans, Mr. Eastman states (R. 155):

> The experience with the voluntary pension systems has been unsatisfactory. The systems were established gradually, each carrier tending to copy plans already in effect. No very penetrating thought was given to them. Some modifications were made in the light of experience and certain practices were changed, but all within the original framework. The depression brought clearly

[16] The study referred to is being conducted in pursuance of the Emergency Transportation Act of 1933, under Section 13 of which the Coordinator was directed to investigate and consider ways and means of "improving transportation conditions throughout the country * * * including, also, the stability of railroad labor employment and other improvement of railroad labor relations and conditions." The study has not yet been completed, but the Coordinator and his associates have arrived at some noteworthy conclusions which are set out in their affidavits.

Mr. Eastman recommended to the Congressional committees which were considering the legislation which culminated in the Retirement Act postponement of legislative action until all the data collected in the course of the study could be completely presented. At the same time he offered criticisms of the bills then pending, which resulted in the elimination of, or changes in, many of their provisions (R. 154). It may be noted that Mr. Eastman made his affidavit five months after his appearance before the Congressional committees, and after having the benefit of additional analysis and consideration of his data.

to light their many weaknesses and uncertainties.

In the light of this experience, a compulsory, automatic, and uniform retirement and pension system for the whole railroad industry is, in my opinion, desirable.

Mr. Otto S. Beyer, Chief of the Section of Labor Relations of the staff of the Coordinator, who has been actively concerned with railroad labor relations since 1919 and who has been in general charge of the study with respect to railroad labor relations being conducted by the Coordinator (R. 198), states (R. 199) his "definite conclusion that the systematic retirement of superannuated employees, substantially in keeping with the plan now provided by the Railroad Retirement Act, is indispensable to the safe and efficient conduct of the industry * * *."

Mr. Latimer, who has been the expert in charge of the study referred to (R. 173), states (R. 182):

> Experience has proved * * * that the gains expected from pension systems cannot be achieved simply through voluntary action. Because of the inadequacies and limitations in the voluntary systems established in the industry * * * the achievement of many of the gains expected has been hampered and in some instances defeated. For the achievement of the desired ends a compulsory system without the limitations of the voluntary plans seems to be essential.

Drawing upon his extensive experience with industrial pensions, and relying on the data collected under the direction of the Coordinator in connection with the study just referred to, Mr. Latimer sets out in some detail in his affidavit the inadequacies of the existing pension plans of the carriers on the basis of which he arrived at the conclusion just stated (R. 172–180). The outstanding respects in which the present carrier plans are said by him to be defective are as follows:

(1) *The carrier systems have largely failed to provide employees with old age security.*—The percentage of employees who may become eligible for pensions under them is not great. An analysis of a sample of 400,000 persons employed during 1925–1928 indicated that of the employees entering the service of the carriers only 17 percent would ultimately qualify for a pension (R. 173). Even this percentage, intentionally calculated on a conservative basis "exaggerates materially the actual number of persons who have entered the service of railways while existing plans have been in effect and who actually had or would receive a benefit under the railways' pension plans" (R. 173).

This is largely due to the fact that practically all of the carrier plans "authorize the payment of pensions only to employees who have been *continuously* in the employ of the particular carrier

for a certain period of years—fifteen, twenty, or thirty"; furthermore, the employee must continue in service up until the retirement date, and "provisions that persons who leave the service of the carrier thereby relinquish all claims to pension allowance are standard in the railroad pension plans, as is the provision that if such persons reenter the service subsequently they shall be considered for pension-record purposes as new employees." (R. 173–174.) Thus an employee who has spent thirty years or more in the railroad industry may be ineligible for any pension because he is separated from service before attaining retirement age; or if he continues in service to age seventy, he may yet not be qualified for any pension because he may have shifted employment and may have been in the service of his last employer less than the required number of years, or because his service period of thirty years with his last employer may have been broken by an unexcused absence.

(2) *The amounts of pensions paid under most carrier plans have not been adequate.*—Of the 50,126 pensions in force on December 31, 1933, of which record was obtained, 25 percent called for payment of less than $30 per month, the average being $54 per month; and only 2.6 percent of the payments to individuals exceeded $100 per month (R. 173), the latter apparently received in large part by retired officials (R. 176).

(3) *The present plans operate to discriminate against the lower paid classes of employees with respect to the probability of securing an annuity.*—Small as is the general probability of ultimate qualification for a pension, the probability varies greatly as between different classes of employees, again because of the requirement of continuity of service. Since, due to seasonal employment, for example, in the maintenance service, there is greater labor turnover among the lower paid employees, these (though obviously in greater need of pensions) have far less chance of benefiting from the voluntary pension systems than have the more highly paid classes of employees. On the basis of the data collected in the Coordinator's study, the probability in the train and engine service of ultimate qualification for a pension is approximately 30 percent, this being 50 percent greater than that for the clerical forces generally, twice as great as that for the agent, towerman and telegrapher group, and about 3½ times as great as for persons in the still lower paid maintenance service (R. 174–175).

(4) *The present plans also discriminate against the lower paid classes with respect to the amount of annuity received upon retirement.*—This is due to the fact that the annuity is ordinarily computed on the basis of 1 percent of the average pay during the last ten years of service, multiplied by the number of years of *continuous* service (R. 175).

Because of the greater rate of labor turnover among the lower paid classes, the number of years of *continuous* service is likely to be less than in the higher paid classes. Also, among the lower paid classes, the average pay during the last ten years of service is likely to be less than the average pay throughout the entire period of service, whereas the pay of the higher-paid classes is likely to increase during the years prior to retirement (R. 176).

(5) *Under existing railroad pension plans no enforceable rights whatsoever are conferred upon the employees.*—The carrier reserves the right to reduce annuities, discontinue them entirely, and amend or abolish the pension plan at any time (R. 177–178). The typical railroad pension plan reserves the right to the management, among other things, "to terminate the pension system or any pension or pensions previously allowed or to modify the pension system in any respect either generally or in its application to any specific case" (*Ibid.*).[17]

In this respect the carrier plans have lagged behind other industrial pension plans. By the end

[17] While the practice has not been extensive, the threat of loss of pensions has been used on occasion as a weapon against collective action by the employees; absence during a strike has been regarded as a break in continuity of service necessary to attain a pension; and persons already retired on pensions have been called back to work during strikes, on pain of loss of pensions (R. 200).

of 1932 almost 50 percent of the plans in other industries provided some form of legal guarantee to pensioners. They have tended to guarantee at least that, once the payment of annuities has been started, the employee will not be deprived of his pension and the amount will not be reduced (R. 178). The fact that employers in other industries have themselves recognized the necessity of providing some form of guarantee indicates the desirability of a compulsory and automatic plan such as that embodied in the Retirement Act.

The number of railway employee retirements on pension has, in fact, diminished from year to year during the last several years. In 1931, 7,417 employees were retired on annuity; in 1932 this number dropped to 7,330; and in 1933, to 5,694 (R. 179). The rate of retirements in 1934 was even lower than in 1933 (*Ibid.*). Some carriers have been making retirements as usual, but a considerable number have been making large reductions in the number of retirements, and at least one carrier has made no retirements since 1930 (*Ibid.*). In the face of an aggravated unemployment situation, as Mr. Beyer points out (R. 200–201), this policy has served only to intensify the dissatisfaction of railroad employees as a whole with the voluntary pension plans. He adds:

> The younger railroad employee, either unemployed or working part time, sees older men retained in the service who ordinarily

would be retired, while the older employee, who has reached retirement age and looked forward to the day when he would be retired, finds that he must continue in service and may, perhaps, never be pensioned at all.

Reductions have also been made in the amounts of annuities. Out of 47 railroad pension plans, 35 have reported reductions in the amounts of pensions payable to some or all pensioners (R. 179–180). The total annuities being paid to 50,216 pensioners as of the end of 1933 amounted to $2,692,662 a month, as compared with a total of $2,942,722 a month originally granted to the same employees, making an average reduction of 8 percent (R. 180). Furthermore, the variation in the amount of reduction as between the several carriers is great, ranging from as low as 1 percent in some cases to as high as 40 percent in others (*Ibid.*). Most railroads reduced pension payments by 10 percent or more (R. 196). When it is considered that the pensions originally granted were small, reductions such as these are substantial. Obviously, also, the amount of a particular reduction may not be as important as the fact that a reduction has been made, for it is thus demonstrated to the employees that they have no assurance of old age support. The threatened withdrawal of a promised pension may be affirmatively demoralizing. Mr. Eastman states (R. 155) that "withdrawal or extensive curtailment of existing pen-

sions in the railroad industry would impair the morale of railroad employees and play havoc with railroad labor relations."

In connection with these recent tendencies, it is no answer that the past several years have been depression years, and that the railroads have found it difficult to meet their pension costs, for the failure of the carriers to set aside funds during prosperous years in anticipation of future needs is another of the grounds on which the existing carrier pension plans are open to criticism.

(6) *The carriers have failed to establish and maintain retirement reserve funds.*—Despite the rapid increase of the amount of pensions payable from year to year and the demonstrated probability that this increase would continue for a long period of years, the railways have continued to charge pension payments against operating expenses each year as the payments are made (R. 177). With one or two exceptions, no serious effort was made by the carriers to secure the solvency of their pension systems (*Ibid.*). In this connection Mr. Latimer states (R. 177):

> This policy of the railroads has been in sharp contrast to the policies pursued by other large American corporations which have maintained voluntary pension plans similar in character to those maintained by the railroads. By one means or another in the period since 1920, funds in excess of $600,000,000 have been accumulated and the

> accumulation has proceeded even during the depression. A number of large companies made heavy charges against their surplus accounts in setting up more or less adequate reserves.

The failure of the carriers to adopt a reasonably adequate financial program, Mr. Latimer suggests, was an important contributing factor which led employees to view with decided skepticism the value of the pension offers made to them by their employers (R. 177).

Respondents may urge that the Railroad Retirement Act likewise fails to provide for any reserve against increased future costs. The sums authorized to be collected from employers and employees under the Act are "such as to provide from the combined employee and carrier contributions, with a reasonable margin for contingencies, an amount necessary to pay the annuities, other disbursements, and the expenses becoming payable from time to time" (Section 5). This is not to be taken, however, as indicating that Congress did not believe that the establishment of a reserve was desirable or necessary. On the contrary, it is apparent that the failure of the Act to provide for the immediate accumulation of reserve funds is due solely to the fact that Congress did not believe it wise to require the carriers to establish a reserve *at this time*. The sums authorized to be collected under the Act will suffice to pay the costs of the retirement system for several years to come (R. 137).

The Retirement Board is required by Section 2 (b) to report to the President not later than four years from the effective date of the Act "recommendations for changes in the system created by the Act, as shall assure the adequacy and permanency of said retirement system * * *". Furthermore, in reporting the bill the Senate Committee said (Senate Report No. 974, 73rd Cong., 2d Sess., p. 2):

> This plan contemplates the possibility of determining from the actual experience such fundamentals as are necessary to the construction of a sound reserve plan.

In any event, under a compulsory, industry-wide system as provided by the Retirement Act, the absence of provision for a reserve fund is not open to the same criticism as is the absence of such provision in the voluntary plans, since the compulsory and industry-wide character of the system may furnish sufficient assurance to employees.

(7) *Finally, and of first importance, is the failure of existing carrier pension plans to eliminate the great amount of superannuation which exists among railroad personnel.*—As previously stated, the fact that railroading is an old established industry has alone brought about much superannuation among its employees (R. 154). The testimony shows that this natural tendency is enhanced by the employment rules in force on the railroads, especially the system of seniority whereby the younger men in service are the first laid off and

the older men are the first recalled to service, and whereby the older men have rights when unemployed to dislodge the younger men (R. 34, 139, 154–155). Because of these facts, Mr. Eastman states that (R. 155):

> Superannuation among railroad employees is probably much in excess of that existing in industry generally.
>
> This excessive superannuation is detrimental to railroad service in several ways. Men who have grown old in the service decline in efficiency. The carrier pays in wages an amount out of proportion to the service rendered. These conditions exist upon the railroads at the present time. There is now a large body of superannuated employees in railroad service who, for the good of the service, ought to be retired.

Similar statements made by Mr. Eastman before committees of Congress went unchallenged by the carriers. (Hearings before Subcommittee of the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., on S. 3231, p. 155; Hearings before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., on H. R. 9596, p. 35.[18]) Similar statements were made by persons

[18] Mr. Eastman stated, among other things, that a survey just completed by his staff showed that of the total employees in the service of the carriers on January 1, 1934, approximately 25 per cent or about 250,000 employees had already attained or would in the next four years attain the age of 65 or more, or would have completed 30 years of service.

whose affidavits were filed in the present case, on the basis of their observations and special investigations (Latimer, R. 179; Beyer, R. 198–199).

The failure of existing railroad pension plans to deal with the situation is due in part to the fact that some carriers have no pension systems,[19] but primarily to the fact that the compulsory retirement age under the plans of the carriers who do have pension systems is normally fixed at 70 years and frequently no compulsory retirement age is fixed (R. 197 and attached statement). The evidence shows that in comparable industries the age of 65 is generally regarded as the desirable maximum age limit for retirement (R. 179; see also *Employees' Retirement Annuities,* Chamber of Commerce of the United States, 1932, p. 21). The proportion of persons 65 or over in the railroad industry is substantially greater than that in other heavy industries (R. 179). According to the cen-

[19] In this connection it is of interest to note the illustration contained in the affidavit of Mr. Clark of a situation upon one of the railroads which has no pension system. The railroad had 21 men among its mail and baggage handlers who were 65 years of age or over, 4 being over 75, 6 over 70, and 11 between the ages of 65 and 69. Mr. Clark stated that the officers of the company, perhaps more than anyone else, realized that these 21 men could not render satisfactory service, but they were retained in the service because they were men who had grown old in the service and had rendered excellent service in the past, and because the company had no pension system. Mr. Clark ventured the opinion that if these 21 men were retired, 10 young and vigorous men could do their work. Numerous similar situations exist, Mr. Clark indicated (R. 191).

sus of April 1, 1930, 3.43 percent of steam railway employees were 65 or over; 2.26 percent in coal mining; 1.5 percent in oil wells; 2.33 percent in the chemical industry; 2.61 percent in iron and steel; and 2.27 percent in transportation other than railroads (*Ibid.*). When it is considered that the railroad industry has been covered by pension systems more than any other, these comparisons become even more significant.

Moreover, the typical railroad worker was, on the 1930 census date, "about four years older than the typical employee in all mechanical industries; over seven years older than the typical employee in all of the industries other than the railroads; and eight and one-half years older than the typical employee in transportation and communication other than railroads. The comparison, if made at present, would undoubtedly show an even wider discrepancy." (R. 179.)

Furthermore, the percentage of employees over 65 in the railroad industry has increased sharply since 1930. Respondents' evidence discloses that the percentage increased to 4.3 percent in 1932. (Statement showing number of employees, attained ages and years of service, Exhibit A to affidavit of Mr. Parmelee, R. 46, 61; R. 225.) According to attained age in 1934, the percentage of persons 65 and over had risen to 4.65 percent, making an increase of 35 percent in about 4 years (R. 225). Because of the continued decline in retirements dur-

ing 1934, already mentioned, the percentage was even greater on the effective date of the Act than at the beginning of the year (*Ibid.*). There are in the service at the present time not less than 48,000 persons who have passed their 65th birthday (*Ibid.*). Their average annual compensation in 1933 being approximately $1,765, their total annual compensation amounted to about $85,000,000. The average annual compensation of all railroad employees in 1933, according to the Coordinator's figures, was $1,319. Accordingly, Mr. Latimer concludes that pay-roll economies would undoubtedly be produced by the retirement of these employees over 65 and their replacement by fewer younger men (*Ibid.*; see also R. 32). The latter would undoubtedly be more vigorous, would do more work, and would receive less pay.

The affidavit of Mr. Parmelee (R. 133–136), introduced in rebuttal, in no way refutes the facts just stated, and may have misleading implications. Mr. Parmelee does not even purport to deny that the amount of superannuation on the railroads has increased enormously and is now greater than it ever was in the past. His affidavit is confined to an attempt at showing, on the basis of census figures for 1930, that on the census date in other employments and in industry as a whole the percentage of superannuation was greater than in the railroad industry. The comparisons of Mr. Latimer above referred to are not questioned, but additional comparisons are made. However, these ad-

ditional comparisons are not persuasive, and, as indicated, may be misleading because the employments selected for comparison are in no way comparable to the railroad industry. The industries mentioned are largely those in which self-employment is common and which do not have the high degree of organization which is present in the railroad industry. In agriculture, trade, domestic and personal service, professional service, forestry and fishing (R. 135) there is no need to guard against superannuation in any way comparable to that in the railroad industry. The industries mentioned present no problem of efficiency of a highly organized unit, composed of many interdependent functions. Substantially the same is true also of the occupations listed in the Parmelee affidavit—farm laborers, blacksmiths, carpenters, painters, glaziers, teamsters and carriage drivers, and retail dealers (R. 135).[20]

Recapitulating, existing carrier railway pension systems are inadequate because: (1) they fail to provide old age security for any substantial portion of railway employees; (2) the amounts of pensions paid have been insufficient; (3) existing plans

[20] Because it is on its face incomplete, and in one major respect, at least, definitely erroneous, we have refrained from referring to the finding of the lower court on the subject of superannuation among railway employees (Finding 20, R. 270). The finding that respondents have no higher percentage of employees of 65 years of age or over than other heavy industries is directly contrary to all the evidence. Moreover, as indicated, there is no conflict in the evidence.

discriminate unduly between different classes of employees with respect to the likelihood of particular employees ultimately retiring on pensions; (4) they also discriminate unduly between classes with respect to the amount of annuity received upon retirement; (5) existing plans confer upon the employees no enforceable rights and, therefore, give them no definite assurance of security in old age; (6) in the face of increasing costs, the carriers' plans have made no provision for future pension liabilities; and particularly (7) they have failed effectively to deal with the problem of superannuation. For these reasons, "the railway pension systems * * * were facing a crisis with a threat of a break-down which was becoming increasingly more probable" (R. 180).

B. The Calculated Effect of the Railroad Retirement Act

In contrast with the voluntary systems, the system established by the Retirement Act provides assurance to the employees of old age security. By elimination of the requirement of continuity of service and continuation in the service of one carrier until the retirement date, the Act removes the basic reason why so few persons become eligible for pensions under the existing systems. It also removes the factor which has tended to bring about the discrimination which has existed in favor of the higher paid classes as against the lower paid classes of railway employees, with respect to both (1) the likelihood of obtaining any pension, and

(2) the amount of annuity received. Furthermore, the computation of annuities under the Act on a graduated basis (the following percentages of monthly compensation being used: 2% of first $50; 1½% of the next $100; and 1% of compensation in excess of $150 and up to $300) is also calculated to alleviate the discrimination against the lower paid classes with respect to the amounts of annuities paid to them under the existing carrier plans (Sec. 3).

Under the Retirement Act the amounts of annuities to be received by retired employees will, in the case of retirements in the immediate future, be approximately 50 percent of the rate of pay during the last 10 years of service, and will be slightly less than this in the years to come (R. 184). Although this is below the amounts of annuities now being granted under voluntary pension plans in other industries (R. 184), it will undoubtedly be in excess of the amounts of annuities (R. 173) now being paid under the railway pension plans.

With respect to the removal of superannuation, the Act fixes the compulsory retirement age at 65, uniformly applicable to all carriers subject to the Act [21] (Sec. 4).

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[21] The provision in Section 4, whereby retirement may be extended by written agreement between the carrier and the employee for successive periods of one year each until age 70, provides a reasonable degree of flexibility, and permits the retention in service of such employees over 65 who are still capable of working efficiently.

The Railroad Retirement Act improves upon the desirable elements of the voluntary pension plans and adds features which are calculated to promote fairly the objectives of a sound industrial pension system:

Promotion of economy.—Waste is eliminated by the systematic removal of superannuated workers from the service and the substitution of younger men who, while receiving less pay, are able to produce more, and by the removal of the "drag" which older workers exert upon the entire working force. The efficiency of the force is improved also when the avenues of promotion are opened "and the young and ambitious worker need no longer feel that only death can bring him an opportunity to advance." (National Industrial Conference Board, *Elements of Industrial Pension Plans, supra,* at p. 10). In the words of the Conference Board (*Ibid.*):

> Opportunity breeds ambition and energy in all ranks of the working force, with highly desirable, if not definitely measurable results.

In the railroad industry particularly there is need for these influences. On account of the seniority rules, the tendency is to retain older men in the service (R. 34, 139, 154–155, 239). Since 1920 there has been a constant diminution in railroad employment. Class I carriers employed 2,197,824 persons in August 1920 (R. 139). This number was re-

duced to 1,821,490 in June 1927, and in June 1934 stood at 1,070,837 (*Ibid.*). Under the practice of laying off the younger men with shortest service periods, in the absence of provision for the systematic retirement of the older workers, no opportunity exists for younger men and women to enter the service. The result is that (R. 199):

> the railroad industry is now severely handicapped through the inadequacy of the influx of young employees to provide necessary candidates for the many positions in the railroad industry which demand responsibility, alertness, resourcefulness, imagination, and cooperative ability.

Improvement of morale.—Efficiency is stimulated also by providing assurance to employees of old age security and thereby improving the morale of the workers, particularly those at middle age and over. That this is not mere theory is illustrated by the following statement of the Industrial Conference Board (*Elements of Industrial Pension Plans, supra,* p. 9):

> Closely related to the consideration of the effect of a pension plan on efficiency of operation is its influence on morale, particularly the morale of older workers. It has repeatedly been demonstrated that a contented working force is normally an efficient working force; that a mind at ease can be concentrated more effectively upon the

task at hand. In the absence of any definite understanding, it is natural that an employee reaching advanced years should worry as to how long he will be able to retain his job and what will happen to him when he loses it. Relieved of that dark prospect, the employee can concentrate on his work, endeavoring to hold his job as long as possible because by so doing he will increase the amount of his pension.

Safety in interstate transportation.—In the light of what has been said, it seems not open to serious doubt that the Retirement Act is intended and is calculated to promote efficiency and economy; and in an industry having as many hazardous occupations as the railway industry, improvement in personnel conditions is likely to mean increased safety.

The increased efficiency and safety brought about by the Act and the improvement in labor conditions and relations will necessarily lead to improved carrier service and make for a more adequate national transportation system.

Position of respondents.—Respondents, nevertheless, take sharp issue with the view that the Act will promote either efficiency or safety. It may be a sufficient answer to their contentions that since there is a substantial amount of evidence to support the judgment of Congress, its action will not be held to be arbitrary or unreasonable. In *Radice* v. *New York*, 264 U. S. 292 (which upheld

the validity of a state law prohibiting employment of women in restaurants for night work) this Court said (pp. 294–295):

> Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaged in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination.

See also: *Bunting* v. *Oregon*, 243 U. S. 426.

However, the evidence relied upon by respondents is not convincing. They rely on the statements of several of their high executives (R. 235–260) that their existing pension plans have tended to promote efficiency in only two ways[22]: (a) by encouraging continuity of service, and (b) by in-

[22] The President of the Union Pacific has, in addition, the "recollection and the impression that in the origin of railroad pension plans the hope that the provisions of such pensions would have a tendency to reduce strikes on the part of employees was one of the reasons for their adoption by railroad companies", though he states that it is his experience

stilling in their employees a feeling of loyalty to their particular employers; that neither of these ways is open under the Retirement Act; and that (some of them add, R. 241–242, 247, 249, 260) efficiency could not possibly be promoted by a pension plan in any other ways. The last statement is entirely without force in view of the evidence above set forth as to the other ways in which industrial pension plans are calculated to promote efficiency and economy (*supra*, pp. 39–47, 70–72).

It may well be that the voluntary plans are intended to promote efficiency and safety by inducing loyalty and continuity of service. It could also be true that these means were ignored in the Railroad Retirement Act, and yet the fact that Congress emphasized different means does not indicate that the Act will not promote efficiency and safety. As the court below indicated, this is a matter involving "questions of wisdom and propriety, rather than of power" (R. 263).

Congress has deliberately chosen the means of providing old age security for all railroad employees, measured by years of service, but not dependent upon continuity of service with any

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that the pension plans have no deterrent effect upon strikes (Gray, R. 236). Mr. Loree states that one of the purposes of the pension system on his road is "to oppose and counteract, so far as practicable, influences principally originating outside of the personnel of said railroad which, at times, become very effective and are planned and intended, and actually do tend, to impair and destroy the free relations between the railroad and its employees" (Loree, R. 256).

particular carrier, as is required under the existing railway pension systems. If it were true, as claimed, that the Act will not encourage continuity of service and will remove the incentives for employee loyalty to employer, it has other virtues, as has been indicated; for example, it provides greater assurance to employees of old age security than has been the case under the carriers' pension plans, and is likely to be productive of efficiency through improvement of employee morale. It appears to have been the policy of the railways to hold the pension out to their employees as a reward for long and faithful service (R. 235–260). In pursuance of this policy, they have retained complete control over their pension systems, have been careful to confer no rights upon their employees, and have paid all the costs themselves. A fundamentally different conception underlies the Retirement Act, namely, that it is in the interest of efficient operation of the railroads, and in the interest of the employees and the public as well, to remove fear of old-age dependency. Recognizing that the problem is a mutual one of both employers and employees, the Act provides for contributions to be made toward the cost by both.[23]

It is worth observing, finally, that if the two objectives of the carrier pension plans have been to induce loyalty and continuity of service, they

[23] This is in accordance with the present tendency in private pension plans of providing for employee contributions. Latimer, *op. cit.*, Vol. II, pp. 932–933.

do not appear to have been particularly successful. With respect to loyalty, employee representatives deny that the railway pension plans have enhanced the feeling of loyalty on the part of employees (R. 221, 223). The fact that but a small percentage of railroad employees remain in the service of a particular carrier continuously for a sufficient period of time to earn a pension under the existing pension plans (R. 173) would indicate that the objective of inducing long continuity of service has also not been successful. (See also Latimer, *Industrial Pension Systems,* Vol. II, pp. 751–752.)

The causes of labor turnover are, in any case, numerous and varied. The turnover is greatest, of course, among employees in the younger age groups. After the employees have reached middle age, the probabilities of voluntary shifts in employment are small. There are powerful deterrents, apart from loss of pensions. Change then involves serious disturbance to home, family, and settled habits. The prospects of finding other employment are not very good. The railroads generally have rules proscribing the employment of inexperienced persons over 35 years of age, or experienced persons over 45 (R. 164). Finally, in the railroad industry, a shift of employment involves the loss of the employee's seniority rights, which may constitute a more valuable interest than the prospect of a pension. The extent to which the younger employee may be deterred from shifting

employment by the prospect of loss of pension is conjectural. The advantage of the pension is so distant in the future, and its ultimate acquisition so uncertain, that it is probably easily sacrificed for the certain advantage of immediate betterment in employment.

To the extent, however, that lowering of industrial labor turnover is desirable and a justifiably hoped-for advantage of a pension system, it is submitted that the Railroad Retirement Act will effectively tend to promote that end. The Act will certainly tend to retain in the railroad industry employees already there, and so long as it is desirable to remain in the industry, employees undoubtedly, for the most part, will prefer to remain with the same carriers, particularly in order that they may safeguard their seniority rights. Mr. Latimer observed, also, that insofar as employees may shift from one carrier to another, this will tend to effectuate the national policy introduced in the Transportation Act, 1920, of providing a uniform national system of transportation, for the transfer of employees from one carrier to another, he stated, will tend to make for uniformity of service standards and bring about uniformity of policy and technique, which will be of great value to the unification of the national railway system (R. 225).

In substance, respondents' objection is that Congress, in legislating for the purpose of promoting efficiency and safety, has not chosen the means of their liking. But the Act of Congress is not

to be condemned because, with a choice of means available, Congress chose the more progressive method already tried in the laboratory of industrial experience and approved and recommended by those qualified to speak.

III

THE PURPOSE, STATED IN THE ACT, OF PROMOTING EFFICIENCY AND SAFETY, IS CONTROLLING

Section 2 (a) of the Act declares that the purposes of the retirement system are to provide for the satisfactory retirement of aged employees, to promote efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers. It provides further that the Act shall be administered and construed "with the intent and for the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for such purpose and for the payment of annuities for the relief of superannuated employees." The bill of complaint charges that the real ends and aims of the Act are not the promotion of efficiency and safety, but to provide for the satisfactory retirement of aged employees, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers; reference is made to the statement in Section 2 (a) as to the manner in which the Act is to be administered and construed, and it is alleged that none of the "ends and aims"

therein indicated "is within any power delegated to Congress by the Constitution" (R. 6). In the court below, respondents relied upon *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Company*, 259 U. S. 20.

It is clear from a mere examination of the Retirement Act that the retirement and pension system embodied therein was not adopted by Congress as a pretext for the accomplishment of unauthorized purposes. The Act is confined to the establishment of a retirement and pension system which will be sound and adequate, and the preceding discussion demonstrates that Congress reasonably believed that such a system would lead to increased efficiency and economy, as well as safety. Nothing contained in Section 2 (a) indicates the contrary.

Making possible more rapid advancement of employees in the service of carriers, as well as the payment of annuities for the relief of superannuated employees, as has been shown, are but parts of a sound and adequate retirement and pension plan which help to make such a plan effective toward the promotion of efficiency and economy. They "are not ends in and of themselves but means to the legitimate end of" promoting efficiency and safety in interstate transportation. Compare *Stephenson* v. *Binford*, 287 U. S. 251, 272.

Respondents place great emphasis upon the reference to relief from unemployment. It is unnecessary to consider whether in the present state of railroad labor conditions Congress would have the

power to deal with the relief of railway unemployment in the interest of improving the national transportation system, since it is obvious that the relief of unemployment is not one of the essential aims of the Retirement Act. If Congress had the power to pass the Act in order to promote efficiency and safety, the fact that the purpose of relieving unemployment will also be served does not invalidate the Act. Compare *Arizona* v. *California*, 283 U. S. 423, 456; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 210; and see also *Hampton & Co.* v. *United States*, 276 U. S. 394, 412.

The reference to unemployment relief in Section 2 (a) is "more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable * * *." *Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658, 668. That this is so is apparent from the fact that, although the Retirement Board is directed to administer and construe the Act, among other things, in order to provide "the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for such purpose", no discretion rests with the Board with respect to the expenditure of sums collected from employers and employees.

Certainly, the Court will not give to the language of Section 2 (a) a strained construction which might raise a serious constitutional question. *Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658, 669.

IV

ENACTMENT OF THE RETIREMENT ACT IS WITHIN THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

Consideration of the question whether the Retirement Act is invalid in so far as it applies to *all* of respondents' employees, including those claimed not to be directly engaged in interstate commerce, will be postponed for the moment (see *infra*, p. 93), in order that there may be considered first the broader question whether Congress is authorized to enact retirement and pension legislation applicable to interstate carriers. The answer to this question will aid also in the determination of whether Congress exceeded its power in including all carrier employees.

The court below "was not prepared to say" that Congress did not possess authority to establish a compulsory retirement and pension system for the railroad industry (R. 262). Respondents do not appear to dispute the power of Congress to enact legislation for the purpose of promoting the efficiency and safety of the national transportation system. Their position seems to be, rather, that the Retirement Act is not really intended, and is not calculated, to accomplish those purposes. In view of the previous discussion it is clear that the Act is both intended and calculated to promote efficiency and safety. That Congress has the power to enact legislation, such as the Retirement Act, for this purpose is equally clear. Efficiency in the

sense intended means, of course, not merely lowest cost operation but also adequacy of service and proper discharge of the industry's obligation to the public, with due regard for the interests of those concerned in it.

The commerce power has been defined by this Court as "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. " 'To regulate' in the sense intended is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." *Second Employers' Liability Cases*, 223 U. S. 1, 47. "The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures to 'promote its growth and insure its safety' (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696–697); to 'foster, protect, control, and restrain' (*Second Employers' Liability Cases*, 223 U. S. 1, 47)." *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 570.

The Retirement Act applies only to the railroad industry, and railroading continues to be the prime

example of interstate commerce. All of respondents are already subject to the Interstate Commerce Act.

A brief survey of the "minutely detailed supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce" (*Wolff Packing Company* v. *Court of Industrial Relations*, 262 U. S. 522, 543) will demonstrate that the Retirement Act falls well within the scope of the commerce power. After being limited for many years to highly restricted regulation of rates in interstate transportation, Federal supervision of interstate carriers has developed into regulation of the railroad industry, as a unified whole, in all respects in which regulation has been deemed necessary in order to insure that the industry would furnish the country a proper and adequate national transportation system.

The broad policies initiated by the Transportation Act, 1920, have many times been expounded and enforced by this Court. In the *New England Divisions Case*, 261 U. S. 184, 189–190, the Court said:

> Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the

> prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.

In sustaining the "recapture" provisions of the Transportation Act in *Dayton-Goose Creek Railway Company* v. *United States,* 263 U. S. 456, the Court, after referring to the *Wisconsin* and *New England Divisions* cases, said (p. 478):

> In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under

> the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

Concern for the preservation, promotion, and protection of the national transportation system has required, as this Court has several times found, the extension of Federal "guardianship and control" beyond the matter of interstate rates alone, to matters which previously might have been left unregulated or subject to State regulation. The Interstate Commerce Commission was thus given the power to regulate and fix purely intrastate rates in order that intrastate traffic might be made to produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to transportation service, both interstate and intrastate (*Illinois Commerce Commission* v. *U. S.*, 292 U. S. 474; *United States* v. *Louisiana*, 290 U. S. 70, 75; see also *Wisconsin R. R. Commission* v. *Chicago, Burlington & Quincy R. R.*, 257 U. S. 563, *supra*); to order divisions of joint rates between groups of carriers with a view to caring for the

financial needs of the weaker roads (*New England Divisions Case*, 261 U. S. 184, 190); to recapture excess earnings of interstate carriers, including earnings derived from intrastate traffic (*Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478); to authorize extensions or abandonments of lines, even when the extensions and abandonments almost entirely concern only intrastate traffic (*Transit Commission* v. *United States*, 284 U. S. 360; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 479; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe*, 270 U. S. 266, 277); to order the establishment of junctions and physical connections between interstate carriers (*Alabama & Vicksburg Ry. Co.* v. *Jackson and Eastern Ry. Co.*, 271 U. S. 244); to approve the acquisition of control of one carrier by another (see *Chicago Junction Case*, 264 U. S. 258; *Texas* v. *United States*, 292 U. S. 522); to require joint use of facilities (*Atlantic Coast Line Railroad Co.* v. *United States*, 284 U. S. 288) and where facilities are jointly used, to supervise rentals to be paid (*Transit Commission* v. *United States*, 289 U. S. 121); and to regulate the issuance of securities by carriers, regardless of the purpose of the issuance (*Pittsburgh and West Virginia Ry. Co.* v. *Interstate Commerce Commission*, 293 Fed. 1001; *cf. United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311).

The broad scope of the authority of Congress in the field of railroad labor conditions and relations is evidenced by the numerous enactments of Congress in this field which have met with the approval of this Court. Congress has enacted safety appliance laws, some of which were directed mainly or exclusively toward the safety of employees, e. g., Ash Pan Act (c. 225, 35 Stat. 476) and the act requiring cars to be equipped with grab-irons and hand-holds, and with automatic couplers (c. 196, 27 Stat. 531). It is to be noted that the safety appliance acts cover all equipment of interstate carriers, whether used in interstate or intrastate commerce. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas and Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33. Congress has enacted legislation limiting the hours of service of employees "actually engaged in or connected with the movement of any train" of an interstate carrier. *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612. The Adamson Act (c. 436, 39 Stat. 721) fixed the wages of certain classes of railroad employees during an emergency. *Wilson* v. *New*, 243 U. S. 332. Federal regulation of labor relations in the railroad industry has been active and of long standing, culminating in 1926 with the enactment of the Railway Labor Act, which was substantially amended almost simultaneously with the passage of the Retirement Act (44 Stat. 577, 48 Stat. 1185; U. S. C., Title 45, Sections 151–163). *Texas &*

New Orleans R. R. Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, *supra*.

It is noteworthy, furthermore, that in the Emergency Transportation Act of 1933 (c. 91, 48 Stat. 211, U. S. C., Title 49, Section 250), the provisions of which this Court has said "confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920" (*Texas* v. *United States*, 292 U. S. 522, 530), Congress found it necessary to assume even greater control over the railroad industry than ever before. It created the office of Coordinator of Transportation with the function, broadly, of directing the elimination of waste in railroad operation and discovering further means and methods of producing operating economies. Of special significance is Section 13 of this Act, previously referred to, which directs the Coordinator to investigate and consider means "of improving transportation systems throughout the country * * * including, also, the stability of railroad labor employment and other improvement of railroad labor conditions and relations." The report of the Senate Committee on Interstate Commerce on the bill which became the Emergency Transportation Act states in part as follows (Senate Report No. 87, 73d Cong., 1st Sess., p. 2):

> It is to be hoped the Coordinator to be appointed under this legislation may be able to standardize equipment, cut off unnecessary and fabulously high paid executives, *bring about a better relation between the carriers*

and their employees, and provide better service for the public. (Italics supplied.)

The Retirement Act is obviously calculated to improve labor conditions and relations and, in this way, to promote efficiency in the railroad industry. The fact that Congress was so concerned about railroad labor conditions and relations as to call for a study by the Coordinator of means of improving them negatives any contention that may be made that existing labor conditions and relations are stable and normal and require no legislative action.

Viewing the power of Congress from another aspect, it is to be noted that approximately 60% of all operating expenses of interstate carriers are expended as direct labor costs. Annual Report, Interstate Commerce Commission, 1933, p. 92. If, as the history of Federal railroad legislation and the decisions of this Court sustaining it disclose, the prevention of waste and the promotion of efficiency in the management of the physical properties of interstate carriers is in the public interest and a proper subject of Federal regulation, it must follow that the promotion of the efficiency of the personnel of the carriers, the great human element in the national transportation system, is likewise within the authority of Congress. As this Court has previously said, in upholding an hours-of-service law applicable to employees in the train service of interstate carriers, "Congress was not limited to

the enactment of laws relating to mechanical appliances, * * *" (*Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission*, 221 U. S. 612, 618–619.)

It was shown at the Congressional hearings on the Retirement Act that interstate carriers have been spending in excess of 30 millions of dollars per year in pension payments.[23] Despite reductions in annuities and reduced retirements, pension costs were increasing year by year, until the pension systems were facing a crisis with the threat of a breakdown (R. 179–180). At the same time, the pension systems were inadequate and ineffective for the accomplishment of the essential purposes of sound pension plans.[24] Here was a condition, it is submitted, affecting on the one hand the finances of the carriers, and on the other hand vitally affecting railroad labor relations and conditions, which was within the province of Congress to consider and to correct.

Attempted separation of retirement and payment of annuities.—The bill of complaint charges that the Retirement Act imposes upon respondents a burden which, if it exists at all, should be borne

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[23] Hearings before Subcommittee of Senate Interstate Commerce Committee on S. 3231, 73d Cong., 2d sess., p. 10.

[24] In both Senate and House reports on the bill which became the Retirement Act, it is observed that "In most part, the pensions provided for are inadequate, and the cost to the railroads is mounting year by year." (Senate Report No. 974, 73d Cong., 2d Sess., p. 2; House Report No. 1988, 73d Cong., 2d sess., p. 2).

by society as a whole (R. 9). It was suggested in the court below that, assuming that Congress may require the carriers to retire their superannuated workers, it does not follow that Congress may compel the carriers to contribute toward payment of annuities to them thereafter.

This attempted separation of retirement and payment of annuities is unreal in any practical sense, since it would be impossible to require carriers to cast old workers aside without means of support. As has been stated, employers have themselves recognized this obstacle to discharging aged workers without some form of pension. (Supra, p. 40.) Of more importance, however, the argument ignores the advantage of increased efficiency which results from the removal of the employee's fear of old-age dependency.

Unquestionably the employees and the public will benefit materially from the Act. The requirement that the railroads contribute two-thirds of the cost of annuities to be paid to retired employees is supported on the basis of the resulting improvement in the efficiency, safety, and quality of the service. The expenditures required by the Act are likely to be offset to a substantial extent by actual pay-roll savings resulting from the fact that fewer persons, receiving lower wages, will be required to replace those retired (R. 181, 191, 205). The balance is justified by the intangible but real benefits which will accrue to the carriers in other ways, i. e., by

removal of the drag exerted upon the working forces by superannuated workers, making room for advancement of the younger workers, and improvement in the morale of the employees by removing their concern regarding old-age dependency; also by the improvement in the service which the carriers will render to the public.

There are analogous situations under the Interstate Commerce Act wherein carriers may be required to expend moneys in order to improve their service in the public interest. The Interstate Commerce Act authorizes the Interstate Commerce Commission to require carriers to make connections with other carriers (*Alabama and Vicksburg Ry. Co.* v. *Jackson and Eastern Ry Co.*, 271 U. S. 244) and to provide themselves with safe and adequate facilities for performing their car service, and to extend their lines, where reasonably necessary in the public interest (Interstate Commerce Act as amended, Sec. 1 (21), Title 49, U. S. C., Sec. 1 (21)). See *Interstate Commerce Commission* v. *Oregon-Washington R. R. Co.*, 288 U. S. 14.

Conclusion.—It is clear from the authorities cited that Congress possessed the power under the Commerce Clause to pass the Retirement Act in order to remedy the inadequacies of the existing carrier pension plans in the interest of promoting efficiency and safety in interstate transportation; also, in order to improve employment conditions and to aid in the establishment of labor relations in

the railroad industry on a rational and stable basis; and, in general, to enhance the quality of the service rendered by the industry.

V

THE ACT IS VALID IN ITS APPLICATION TO ALL EMPLOYEES OF INTERSTATE CARRIERS; AND ITS VALIDITY IS NOT AFFECTED BY *"THE EMPLOYERS' LIABILITY CASES"*

The first ground on which the court below held the Retirement Act invalid was that it applied to "all employees without regard to distinction between those engaged in interstate commerce, those engaged in intrastate commerce, and those engaged in activities which do not constitute commerce at all" (Conclusion of Law 1, R. 273). The court relied (R. 263) upon *The Employers' Liability Cases*, 207 U. S. 463. The court held also that the Act was not separable with respect to employees who were, in the opinion of the court, not properly included therein (R. 273). The court found that a total of 211,107, or nearly one-fifth of the total number, of respondents' employees, were employees whose work and duties were not in interstate commerce or transportation, but were exclusively confined to other phases of respondents' business (R. 267). Their total annual compensation, the court found, is not less than $300,000,000 (R. 268).

Respondents' statistics regarding employees claimed not to be subject to Congressional power.— The number of employees claimed not to be en-

gaged in interstate commerce was determined by the use of a questionnaire which was sent, under the direction of their counsel, to each of respondents (R. 49–53). The questionnaire enumerated 16 classes of duties [25] and called for a report as to the number of persons performing those duties in the month of May 1934. The carriers did not indicate for what periods of time the employees reported in the replies to the questionnaire had held their par-

[25] The 16 classifications are as follows (R. 52–53): (1) Executive and General Officers; (2) Finances, custody, and administration of securities or funds; (3) Corporate proceedings or records; (4) Real Estate, taxes, and titles; (5) Experimentation and Research; (6) Claims and litigation; (7) Accounting; (8) Advertisement, industrial development, and traffic solicitation; (9) Management, operation, care, or protection of buildings or lands not devoted to or used in connection with transportation; (10) Work relating to the construction of buildings and lines of railway; (11) Work relating to the construction of new equipment; (12) Work relating to reconstruction or major repair of equipment withdrawn from transportation service; (13) Foremen and laborers in stores, reclamation, and timber-treating plants; (14) Storekeepers, sales agents, and buyers; (15) Pumping-equipment operators, stationary engineers, and firemen, oilers, coal passers, and water tenders; (16) All other employees not engaged in interstate commerce not included in the preceding classes * * *.

The questionnaire briefly explained the scope of each of these classes and gave instructions that particular employees, for example a vice president in charge of operation and his staff, should not be included (R. 53–54). Subsequent to receipt of the returns of the questionnaire, an additional group of employees, among them persons engaged in "actual traffic solicitation (not including their clerks and stenographers)" were eliminated (R. 58, 59–67).

ticular positions or what positions they had held or what work they may have been engaged in at previous times.

The finding of the lower court that the duties of 211,107 employees referred to "were not in interstate commerce or transportation, but were exclusively confined to other phases of" respondents' business, is not to be understood as meaning that these employees are not engaged in the transportation business of respondents. On the contrary, from an examination of the classes of employees included, it is apparent that nearly all, if not all, are in, and essential to the conduct of, the transportation business. For example, the largest class (class 12, R. 267) comprises 86,493 persons employed in repair shops and engaged in the making of major repairs on transportation equipment withdrawn from service for the purpose of repair (R. 54, 66, 69, 99). They belong to respondents' maintenance of equipment departments and have been specially segregated for the purpose of this case from employees engaged in repairing the same types of equipment on the tracks (*Ibid.*). The second largest class (class 7, R. 267), employees engaged in auditing, accounting, and bookkeeping, includes, among others, auditors of freight accounts, of passenger accounts, of station accounts, of traffic and of freight claims, and their staffs (R. 54; United States Railroad Labor Board, *Rules for Reporting Information on Railroad Em-*

ployees, 96–97, 118–119). These two classes alone account for more than half of those claimed not to be subject to Congressional control. It will hardly be urged that the executives and general officers and their staffs (class 1, R. 267) are not concerned with the transportation business of respondents. Employees engaged in advertising and industrial development (class 8, R. 267), of course, advertise the transportation service and develop traffic. And foremen and laborers in stores having the custody of materials and supplies "not yet incorporated in operating properties and not yet devoted to transportation services" (class 13, R. 267) are no less clearly engaged in respondents' transportation business. No phases of respondents' business other than transportation require such employees.

It is unnecessary to exhaust the list for, obviously, since respondents' business is, at least predominantly, transportation, substantially [28] all of their employees are necessary to the conduct of that business. Respondents offered no evidence to show that, in fact, the inclusion of all employees is not reasonably related, or reasonably necessary,

[28] The application of the Act to three minor classes of employees (employees engaged in miscellaneous activities such as the handling of investment accounts, securities, rents, and the sale of electric power, employees engaged in intrastate suburban service of the carriers, and employees engaged in coal mining), separately considered by respondents and the court below (Findings 11, 12, 13; R. 268), is left for consideration at the end of this section.

to the promotion of efficiency and safety in interstate transportation; or to show that the efficiency of only particular classes of employees, and not others, affects the efficiency of the national transportation system. They appear to rely exclusively upon *The Employers' Liability Cases* and to argue that Congress lacks power under the Constitution to enact legislation applying to employees who, within the meaning of the decisions construing the Federal Employers' Liability Act, are not directly engaged in interstate commerce.

The cases under the Federal Employers' Liability Act do not indicate the limit of congressional power under the commerce clause.—Just how the classes of employees claimed not to be engaged in interstate commerce were determined does not appear. It may be inferred that respondents have relied to a substantial extent upon decisions of this Court construing the Federal Employers' Liability Act, C. 149, 35 Stat. 65. If this is true, it is clear that respondents are in error, for this Court has made it clear that in construing that Act decision has rested not upon the extent of the power of Congress under the commerce clause, but upon "the evident purpose of Congress in adopting the Act." Thus, in *Illinois Central Railroad Company* v. *Behrens,* 233 U. S. 473, suit was brought by a member of a switching crew who was injured in the course of his employment. This Court denied him recovery under the Employers' Liability Act, but stated that Congress undoubtedly could have

extended that Act to him. The Court said (pp. 477–478):

> Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. * * * *Passing from the question of power to that of its exercise,* we find that the controlling provision in the Act of April 22, 1908, reads as follows: * * * Giving to the words * * * their natural meaning * * * it is clear that *Congress intended to confine its action* to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. (Italics supplied.)

See also: *Shanks* v. *Delaware, L. & W. R. R. Co.*, 239 W. S. 556, 558; *Kinzell* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, 133; *Chicago & North Western Ry.* v. *Bolle*, 284 U. S. 74, 78. Since the Federal Employers' Liability Act is not

co-extensive with the power of Congress under the commerce clause, the cases arising under that Act may not be taken as the limit of Congressional authority, even with respect to the regulation of employers' liability.

That respondents exaggerate the decision in *The Employers' Liability Cases* is apparent from the fact that Congress has since, on more than one occasion, enacted legislation applicable without differentiation to all railroad employees; and the statutes referred to have been sustained by this Court. Thus, safety-appliance acts protecting employees engaged in intrastate commerce as well as those engaged in interstate commerce, were upheld on the ground that the commingling of interstate and intrastate commerce made it necessary that the same regulations cover both. *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Texas & Pacific Railway Co.* v. *Rigsby,* 241 U. S. 33. This Court said, at the last term, "the duty to protect employees by the prescribed safety appliances exists even though the vehicles and the employee injured * * * are at the time engaged in intrastate commerce." *Moore* v. *Chesapeake & Ohio Ry. Co.,* 291 U. S. 205, 214. Similarly, an act limiting the hours of service of employees of interstate carriers "engaged in or connected with the movement of any train" was sustained over the objection that employees engaged in intrastate service were included. *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce*

Commission, 221 U. S. 612. The Railway Labor Act (c. 347, 44 Stat. 577), the constitutionality of which was questioned without success in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, applied to employees of carriers generally without regard to their employment in interstate commerce, much the same as does the Railroad Retirement Act.

Respondents and the court below are in error if they assume, as they appear to, that *The Employers' Liability Cases* prescribe a limit with respect to the classes of employees of interstate carriers to whom Federal commerce legislation may apply.

The applicable principles.—The question must be determined on the facts in each case by reference to the purposes sought to be accomplished through the legislation involved and by determination whether the inclusion of employees as defined in the statute is reasonably necessary in order to effect those purposes.

The applicable principles have been so often stated by this Court as to make their restatement here at length superfluous. They rest upon the supremacy of the Federal authority in the field of matters committed to the Federal Government under the Constitution. As stated by the Court in the *Minnesota Rate Cases,* 230 U. S. 352, 399:

> The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Con-

> gress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.

In *Stafford* v. *Wallace*, 258 U. S. 495, the Court was dealing with transactions and employments concededly local in character, but because they were essential to the flow of interstate commerce they were held to be subject to Federal regulation under the commerce clause. The following, taken from the Court's opinion (pp. 515–516), is significant:

> The stockyards are not a place of rest or final destination. Thousands of head of livestock arrive daily by carload and trainload lots and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one State to another. Such

> transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the livestock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyard and the sales are necessary factors in the middle of this current of commerce.

See also: *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

The principles governing these cases underlie the Transportation Act, 1920, and related subsequent legislation wherein Congress has acted in the interest of assuring to this country an adequate national

system of transportation.[27] The Retirement Act falls within this latter class.

In the Emergency Transportation Act of 1933, Congress indicated in positive terms its concern over existing labor relations and conditions, and called for a study of means of their improvement. C. 91, Sec. 13, 48 Stat. 216. As has been shown, the Railroad Retirement Act is intended in part to accomplish the same end by improving the morale of the workers, through removing superannuated workers, thus making room for the promotion of the younger workers now in the service and the placement of new young employees in the service.

[27] The issuance of securities and the construction and the abandonment of a line of railroad have, under the Transportation Act, been subjected to Federal supervision and regulation in the interest of insuring adequate national transportation service. *Transit Commission* v. *United States*, 284 U. S. 360, *supra*; *Colorado* v. *United States*, 271 U. S. 153; *Texas & New Orleans Railroad Co.* v. *Northside Belt Railway Co.*, 276 U. S. 475, 479, *supra*; *Pittsburgh & W. Va. Railway Co.* v. *Interstate Commerce Commission*, 293 Fed. 1001, *supra*. As has been indicated, the Interstate Commerce Commission has fixed intrastate rates (*Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, *supra*); has recaptured income derived from intrastate traffic (*Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, *supra*); has regulated the amount of rental to be paid by one carrier to another, for use of facilities largely for intrastate transportation purposes (*Transit Commission* v. *United States*, 289 U. S. 121); and has authorized an interstate carrier, in defiance of State law, to remove its offices and shops from the State (*Texas* v. *United States*, 292 U. S. 522). In short, the business of interstate carriers, in all its essential aspects, has become a matter of national concern.

It bears repetition that, in believing that a compulsory retirement and pension plan would improve the efficiency of the industry and make for economies, Congress had before it the example of the general adoption of retirement systems, both in public and private employment, as well as the deliberate conclusions reached after years of exhaustive research and investigation by industrial organizations.

In no better way, perhaps, can the importance of the railway personnel be illustrated than by the fact that approximately 60% of the operating expenses of carriers are devoted to the payment of wages. Annual Report, Interstate Commerce Commission, 1933, p. 92. It seems hardly necessary to observe, either, that efficiency of the transportation system is dependent upon the efficiency of every part of that personnel. In *Colorado* v. *United States,* 271 U. S. 153, *supra,* the State of Colorado contested the validity of an order of the Interstate Commerce Commission authorizing the abandonment of a branch line of an interstate railway lying wholly within the State. In overruling the contention that the Commission lacked power to authorize abandonment as respects intrastate traffic, the Court said (p. 164):

> This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner

> in which one is performed necessarily affects the performance of the other. *Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.* (Italics supplied.)

In the *Dayton-Goose Creek Railway* case, 263 U. S. 456, *supra,* in referring to the objection of the railroad that the sum sought to be recaptured included net income from intrastate operations, the Court said (p. 485):

> In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of congress to exercise such control has been clearly established. *Minnesota Rate Cases,* 230 U. S. 352, 432, 433; *Illinois Central R. R. Co.* v. *Behrens,* 233 U. S. 473, 477; *The Shreveport Case,* 234 U. S. 342, 351; *Illinois Central R. R. Co.* v. *State Public Utilities Comm.,* 245 U. S. 493, 506; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563.

The claim is made in this case that one-fifth of the entire personnel, receiving compensation of not

less than $300,000,000 annually, is beyond the regulatory powers of Congress. It seems inconceivable that Federal supervision of abandonments of intrastate lines of interstate carriers (involving comparatively insubstantial burdens upon interstate commerce, *Transit Commission* v. *United States,* 284 U. S. 360) is necessary to insure the efficient operation of the industry, but that supervision of one-fifth of the entire personnel, receiving great sums as annual compensation, is not equally necessary for the same purpose. It is pertinent to point out that the existing pension plans of the carriers are not limited to employees in the train service, but cover all employees.

It is evident that the achievement of the purposes of the Retirement Act, previously described, warrant and require the inclusion under the Act of all of the employees of the carriers.

Railway labor legislation.—It would seem that the question of whether all employees may be included has already been answered, since, as previously indicated, Congress has, in the Transportation Act, 1920, and since, adopted labor legislation not restricted to employees engaged directly in interstate commerce. Nor has this legislation been questioned on that account. Title III of the Transportation Act, 1920 (C. 91, Sec. 304, 41 Stat. 470, U. S. C., Title 45, Sec. 135), established the Railroad Labor Board, with authority to decide disputes between all carriers and their employees generally.

That act made no reference to employees engaged in interstate or intrastate commerce, or any commerce.[28] It came before this Court in a suit brought by the Pennsylvania Railroad to enjoin the Board from rendering a decision in a dispute between the carrier and a union representing employees "engaged in shop work", the holding of the Court being that the rendering of a decision by the Board could not be enjoined. *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U. S. 72; the question whether the Act could validly apply to disputes between the carrier and employees not directly engaged in interstate commerce was not raised.

Title III of the Transportation Act, 1920, was superseded in 1926 by the Railway Labor Act (c. 347, 44 Stat. 577, U. S. C., Title 45, Secs. 151–163). This Act, designed to protect the rights of railroad employees to bargain collectively and to achieve the solution by arbitration or mediation of disputes between carriers and employees, likewise was made expressly applicable to employees of interstate carriers generally (Sec. 1). The constitutionality of this act was attacked, but not on the ground of its applicability to all employees. *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, *supra.* In sustaining the constitutionality of the provisions of

[28] Preceding acts, e. g., The Erdman Act of June 1, 1898, c. 370, 30 Stat. 424, and the Newlands Act of July 15, 1913, c. 6, 38 Stat. 103, applied only to employees engaged in train operation or train service.

the Act prohibiting employers from interfering with the rights of employees to elect their own representatives for the purpose of bargaining, this Court said (p. 570):

> We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697); to "foster, protect, control, and restrain" (*Second Employers' Liability Cases*, 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures.

It may be noted that this case involved the authority of the plaintiff brotherhood to represent the railway clerks in the employ of the defendant carrier, that is to say, some of the very employees claimed by respondents not to be subject to Congressional power.

The Railway Labor Act was substantially amended at the same time that the Retirement Act was passed, and, as amended, contains practically

the same definition of employees subject to the Act as does the Retirement Act. C. 691, 48 Stat. 1185.

In *Long Island Railroad Co.* v. *Department of Labor of the State of New York*, 256 N. Y. 498, the New York Court of Appeals held that a State law regulating hours of labor and wages of workmen engaged in the elimination of grade crossings could not lawfully apply to employees of interstate carriers, without regard to whether the employees were themselves engaged in interstate commerce. The Court took the view that the enactment of the Railway Labor Act by Congress evidenced an intention of Congress to exclude "any interference by any State in the field of wages of employees of interstate carriers."

Practical considerations.—There are practical considerations which render the decision in *The Employers' Liability Cases* inapplicable to a retirement and pension law. Under an employers' liability act regulating solely liability arising from accidents occurring at particular times, it is necessary to determine only whether a particular employee was engaged in interstate commerce or transportation at the instant of the accident. But under a retirement act, where employment for a period of years precedes each retirement, it would necessarily be exceedingly difficult as well as costly to administer a plan which required the keeping of records of the character of the employment of each employee from month to month, day to day, and

even hour to hour, showing employment in interstate and intrastate commerce.[29] And in addition, the likelihood would be that upon retirement the employee would find himself involved in costly litigation to determine whether during particular periods of his service he was engaged in interstate or intrastate activity. Obviously such a situation would defeat the purposes of the Act.[30]

Moreover, where particular employees shift from time to time between tasks involving intrastate and interstate commerce, the total amount of time spent by a particular employee in interstate commerce might often be too short to entitle him to an adequate annuity.

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[29] In this connection, Mr. Latimer states (R. 182): "Records of individual railway employee histories, * * * indicate a rapid change of employees from one job to another. Moreover, the necessity for flexible organization requires rapid shifts in the duties of those holding the same position. The provision for old age is essentially a long-time, saving process. In order to arrive at a satisfactory basis for computing costs and determining amounts of annuities, it is essential that there be some stable basis on which to make calculations. Any attempt, for pension purposes, to segregate groups of employees or time spent by individual employees on the basis of the classification employed in the affidavit of Dr. Parmelee, verified September 17, 1934, would be an almost impossible task and would involve expense which would probably exceed any benefit to be derived therefrom."

[30] Even under the Federal Employers' Liability Act there has been much litigation over the question whether the particular duties were or were not in interstate transportation. See Schoene & Watson, *Workmen's Compensation on Interstate Railways*, 47 Harvard Law Review, 389, 399, *et seq.*

That employees in the course of their careers often shift, or are transferred, from one position to another is a matter of common knowledge. Furthermore, as cases arising under the Employers' Liability Act indicate, in some positions an employee may at different moments shift from duties in interstate commerce to those in intrastate commerce and vice versa. See *Chicago and North Western Railway Company* v. *Bolle*, 284 U. S. 74, 76–77, and cases cited. Mr. Eddy stated by way of illustration that (R. 194):

> a railroad machinist may be working in the back shop today, in the engine house tomorrow, and attending a running repair on an interstate locomotive the day after. During a life service of thirty years or more, a member of the craft will be engaged in practically every occupation requiring the application of machinists' skill to railroad operation. * * *.

It is undoubtedly equally true that many employees in the clerical forces shift from time to time as between interstate and intrastate functions. These are not changes due to labor turnover, but shifts due to the advancement of employees, changes in organization, and fluctuations in the needs of the carriers. It should not be overlooked that with respect to each carrier, the employees are under the carrier's control, and, subject possibly to union agreements, may be required at any time to work in any position which the carrier may designate.

In the *Long Island Railroad Company* case, *supra*, the New York Court of Appeals, in holding that a State law regulating hours of labor and wages of workmen engaged in the elimination of grade crossings could not validly apply to employees of interstate carriers, said (p. 516):

> The work of a carrier is for most purposes a unit, and it would hardly be feasible to segregate work in interstate commerce or the employees engaged therein from other work and employees. Excessive hours of labor performed in intrastate work may diminish the efficiency of a worker, thereafter employed in interstate commerce. Difference in wages paid to men doing the same grade of work for the same employer and even at times shifted from one form of work to another may create labor unrest which will affect interstate commerce. Congress may, therefore, assume exclusive jurisdiction in such matters.

The practical situation requires that retirement legislation be applied to all employees of interstate carriers. As this Court said in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks, supra*, p. 570, in shaping its legislation Congress is entitled to take cognizance of actual conditions and to address itself to practicable measures.

Special categories of employees.—Respondents point separately to three particular classes of em-

ployees, who they urge may not be covered by the Retirement Act: (1) employees engaged in miscellaneous activities such as the handling of investment accounts, securities, rents, and the sale of electric power; (2) employees engaged in the intrastate suburban service of the carriers; (3) as to two of respondents, employees engaged in coal mining. The contentions as to these employees clearly do not affect the validity of the Act as a whole. At most, the Act may be held to be not applicable to some or all of these limited classes of employees; or the separability clause (Section 14) may be applied to exclude them from the operation of the Act. It is submitted, however, that there is no basis for excluding these employees.

(1) *Miscellaneous activities.*—With respect to the first group, affidavits of five of the largest carriers (R. 124–130) were introduced, all substantially alike, so that one may be taken as typical. An official of the New York, New Haven & Hartford Railroad states (R. 124–125) that that carrier is engaged not only in the business of a common carrier but in addition is the owner of stocks ($108,000,000), bonds ($65,000,000), and other securities of other companies, as well as of real estate not used for transportation purposes ($8,000,000). Gross revenues are received by it from the sale of electricity to others ($960,000), rent of buildings ($120,000), dividends ($1,129,000), income from funded securities ($2,320,000) and unfunded

securities ($243,000), and other miscellaneous sources. A considerable number of the officers and employees of the company "are continuously engaged in duties in connection with the investment in, attention to, accounting and financing of, the investments and assets above referred to * * * while many other officers and employees * * * are largely engaged in such duties."

No intimation is given of the actual number of employees engaged in these functions and whether over a period of time any employees are exclusively engaged therein.[31] Even assuming that such employees are not to be regarded as railway employees along with all others, it is submitted that respondents have failed to make a full and sufficient showing such as would be required before the Court would hold the Act inapplicable or void as to those employees.

(2) *Intrastate suburban service.*—Four affidavits were introduced showing the extent and

[31] The records of the Interstate Commerce Commission indicate that railways reporting expenses for the maintenance of investment organizations in 1932 showed *total* expenses on this account of only $31,827. This sum is supposed to include all "directly assignable organization and administration expenses", which are incident to investment in leased and nonoperating physical property, and in stocks, bonds, or other securities. See Interstate Commerce Commission, *Statistics of Railways in the United States*, 1932, p. S–56; Interstate Commerce Commission, *Classification of Income Profit and Loss and General Balance Sheet Accounts for Steam Roads*, 1914, p. 23, Account No. 549.

character of the intrastate suburban service of four carriers (R. 118–124). The facts vary slightly in each case. The Illinois Central employs separate tracks and equipment, including electric trains, for its local suburban service, except that occasionally at night and in emergencies other trains are operated on some of the tracks (R. 119). Approximately 666 employees have duties exclusively devoted to this service, but some occasionally leave this service for some other service (R. 119). Whether interstate passengers travel in the suburban trains of the Illinois Central on through tickets is not indicated.

The Long Island Railroad has a total of 837 employees engaged in its local passenger commutation service (R. 120). A small fraction of its earnings in 1933 was from interstate passenger traffic (R. 124).[32] The Pennsylvania Railroad has 202 employees engaged in its local passenger commutation service (R. 121). Whether or not interstate passengers are carried in trains engaged in this service is not shown.

The New York Central has three intrastate branches devoted to passenger commutation service, in two of which 162 persons are employed (R.

[32] In *Transit Commission* v. *United States*, 284 U. S. 360, 369, it appeared that interstate traffic constituted approximately .16% of the gross revenue of the Long Island Railroad.

121–122). As to one of these, the affidavit states that "all of the passenger traffic * * * thereof *was* [*sic*] local and intrastate within the State of New York", this statement being supported, however, solely on the basis of the fact that in a single month, June 1934, no tickets were sold for transportation to destinations outside the State (*Ibid.*). With respect to the second branch, the passenger service performed thereon "was predominantly, if not entirely, local and intrastate" (*Ibid.*). On the third branch "to a considerable extent * * * a substantial amount of wholly intrastate passenger traffic is performed, the precise statistics of which are not readily available, * * *" (R. 123).

So far as appears, all of these lines are a part of the national transportation system and subject to Federal jurisdiction to the same extent as other lines of interstate carriers. *Transit Commission* v. *United States,* 284 U. S. 360. No basis is shown, therefore, for segregating the employees engaged upon such lines.

(3) *Coal mining.*—Two of respondents operate coal mines (R. 115–117). These mines, as stated by respondents, are operated for their own use and for their employees under the restrictions of Section 1 (8) of the Interstate Commerce Act, as amended. *Norfolk & Western Ry. Co.* v. *United States,* 287 U. S. 134.

VI

THE MEASUREMENT OF ANNUITIES BY REFERENCE TO SERVICE PERFORMED PRIOR TO THE PASSAGE OF THE ACT IS NOT ARBITRARY OR OTHERWISE UNLAWFUL

The amount of the annuity which an employee is entitled to receive upon retirement under the Retirement Act is determined by multiplying a graduated percentage of his average compensation [33] by the number of years of his service, not over thirty (Section 3). Respondents attack this provision insofar as periods of service rendered prior to the Act are considered in the computation of annuities, on the ground that it "arbitrarily and unlawfully operates only on past services and events" (R. 11). The court below sustained this contention of respondents, saying in part that to require respondents "to contribute huge sums of money to be devoted to the payment of pensions or annuities based upon services long since completed and fully paid for seems to me to take their property without due process of law" (R. 264).[34] This

[33] Average compensation is the average pay received during the employee's entire period of service, except that average pay received for all pay roll periods worked during the eight years prior to December 31, 1931, is to be taken as the average pay for the entire period of service rendered prior to the taking effect of the Act. No part of any compensation in excess of $300 per month is to be considered (Section 3).

[34] The court states in its opinion that upon the assumption of uniform retirement at 65 the gross annuities which will

ruling was the second of the two grounds on which the court below held the Act as a whole invalid.

The language just quoted from the lower court's opinion discloses that the court omitted to take account of the purpose of the annuity payments and misapprehended the role of prior service in determining the amounts of annuity payments. It has been shown that the pension is not at all an additional payment for past services "long since completed and fully paid for", but is an expenditure for a present and future benefit through improvement of the personnel of the carriers. As has been stated, one of the chief objectives of the retirement plan is to secure the retirement of superannuated employees. Experience has shown that unless some provision is made for their support employment officers hesitate to discharge elderly workers, and they are retained in the service at the expense of the efficiency of the organization and often at great cost. (*Supra*, pp. 40, 48.) If Congress is authorized to provide for the compulsory retirement and pensioning of superannuated workers, clearly the manner in which the

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be required to be paid to present employees of the carriers on account of service rendered prior to the enactment of the Act will amount to over $4,000,000,000 (R. 264). The court omitted to state that this sum would be payable over a period of some eighty years, and that the employees would contribute one-third: also that a substantial portion of that sum would have been paid by respondents by virtue of their existing pension plans had the Retirement Act not been passed (R. 211).

amount of annuities shall be determined rests in its sound discretion.

The fact that the carriers themselves have adopted length of service as a measure of their pensions, and that this has been the practically universal practice,[35] would seem to be conclusive proof of its reasonableness. Several other bases might have been used, each having some support in reason. Thus a uniform annuity for all pensioners, or an annuity in an amount adjusted to the needs of the individual employee, might be used; or the amount might be fixed solely by reference to the compensation at time of retirement. The method adopted in the Retirement Act—based both upon average compensation and length of service—seems the fairest to the employer and to the employee. The maximum annuity payable under the Act is only $1,440.00, and to receive this maximum the employee must have been in the service thirty years and have attained the age of 65, and must have been paid an average monthly compensation of $300 (Section 3).

It is true that with respect to those employees whose service periods antedate the passage of the

[35] From his analysis of existing pension plans in all industries, Mr. Latimer found that "in by far the largest number of plans * * * the pension is related to the period of the employee's service and his average pay during some specified period." Latimer, *Industrial Pension Systems*, Vol. 1, pp. 150–151. This is precisely the method adopted in the Retirement Act.

Act, the Act draws upon past facts for the calculation of the amount of annuities payable to them upon retirement. But present and future facts constitute the grounds and the occasion for the payment of the annuities. As stated by this court in *Cox* v. *Hart*, 260 U. S. 427, 435, where another act of Congress was attacked upon a ground similar to that urged here:

> The language in terms applies to one who at the time of enactment occupied a particular status, viz, the *status* of a person who has done the things enumerated. A statute is not made retroactive merely because it draws upon antecedent facts for its operation.

See also *Hawker* v. *New York*, 170 U. S. 189.

It should be noted that if all service prior to the Act is excluded in the computation of annuities, that is, if the computation of annuities were to commence only with service rendered subsequent to the Act, 25 or 30 years would have to elapse before annuities sufficiently adequate to provide old-age security could be earned. Since to compel the retirement of employees without adequate annuities would not only be unthinkable but would be inconsistent with the purposes of the Act, the effective operation of the Act would have to be postponed for a generation.

The payment of pensions, under State pension laws, has been several times sustained, although the

service periods of the pensioners in part antedated the laws, in the face of express constitutional prohibitions against the payment of additional compensation for services previously rendered and paid for. *State* v. *Love*, 89 Neb. 149; *Hammitt* v. *Gaynor*, 144 N. Y. Supp. 123, 127, affirmed in 165 App. Div. 909; *Wright* v. *Craig*, 195 N. Y. Supp. 391, affirmed in 234 N. Y. 548; *Carr* v. *Roesch*, 246 N. Y. Supp. 628, affirmed in 255 N. Y. 614; *Cobbs* v. *Home Insurance Co.*, 18 Ala. App. 206; *Whitehead* v. *Davie*, 189 Calif. 715; *De Wolf* v. *Bowley*, 355 Ill. 530; *Bowler* v. *Nagel*, 228 Mich. 434; *Byrd* v. *Dallas*, 6 S. W. (2d) 738; and *State* v. *Levitan*, 181 Wis. 326. In most of these cases the pension plans involved provided for measurement of annuities according to final compensation only and not years of service. However, the decisions plainly negative respondents' contention that a pension is added compensation for services previously rendered.

Inclusion of prior service of reemployed persons.—Respondents allege in their bill of complaint (R. 10), and the Court below found (R. 266), that there are something over a million persons not presently covered by the Act who formerly were employed in the railroad industry, and whose earlier service, if they should hereafter be reemployed, will be added to their subsequent service for the purpose of determining their pension rights.

Respondents contended below that a former employee with a long term of prior service might obtain employment for a short period and under the Act become eligible for a pension measured by all the years of his service.

Respondents' own testimony is that one carrier rarely employs the former employees of other carriers but selects only its own workers. Respondents' witness states that "it has been the prevailing practice of the carriers for many years, as forces are enlarged or as vacancies are filled, to give the preference to former employees of such individual carriers, and by reason of this practice, the deponent avers that no substantial or significant number of persons separated from the employ of any of the carriers", prior to the Act, "have been employed by other carriers, * * *" (R. 139; see also R. 50). Consequently, since the carriers ordinarily employ only their own former employees, it is distinctly within their control to prevent a former employee with a long period of service from returning for a short period of service only to be retired on pension. Furthermore, it is the practice of the carriers under the seniority rules, when men are laid off, to lay off first men with the shortest periods of service (R. 34, 139). Another rule common upon the railroads, which prohibits the hiring of men over 45 (R. 164), also makes it unlikely that a former employee will obtain employment less than 20 years before retirement age.

Furthermore, the fact that a man's period of service has been interrupted by a period of unemployment furnishes no reasonable justification for treating him, upon retirement, as though his service had only begun at the time of reemployment.

Under all the circumstances, in view of the policy of the Act to provide an adequate annuity upon retirement and of the fact that unless total years of service are included the annuity is not likely to be adequate, and in view of the fact that the abuse which respondents claim to foresee is largely theoretical, the inclusion by Congress of the prior service of persons formerly in carrier employ who became reemployed subsequent to the Act is not unreasonable.

Contribution of employees now eligible for retirement.—Respondents make a point also of the fact that in the case of persons already eligible to retire, they will have contributed little toward their own annuities. The Court below found that there are now in the employ of respondents not less than 12,696 employees, other than officials, who are 70 years of age or over, and who under the Act are required to retire forthwith (Finding 15, R. 268–269). The Court found that they will contribute a total of approximately $266,616.00 to the retirement fund but will receive in annuities not less than $9,500,000.00 the first year and not less than $78,000,000.00 to the termination of their annuities (*Ibid.*):

On the basis of what has already been said, the answer to respondents' contention based upon these facts is obvious. The retention of these employees aged 70 and over is injurious and costly to the service. Except for the Act, a number of them would be retained in the service. Their retirement is required by the Act in the interest of improving the service. That they will receive from the fund more than they will have contributed is not significant for all retired employees receive more than they contribute.

Furthermore, the evidence indicates that the 70-year-old men are to be found largely in the train and engine service in which the highest wages are paid (R. 32). The older employees also receive higher wages than the average (*Ibid.*). Consequently, it may be expected that in addition to the intangible benefits which may be expected to accrue to the carriers, substantial actual pay-roll savings will result through replacing the 70-year-old men with younger men at lower salaries.

VII

THE INCLUSION, AMONG THOSE ELIGIBLE FOR ANNUITIES, OF PERSONS WHO WERE IN SERVICE WITHIN A YEAR PRIOR TO THE ACT IS NOT UNREASONABLE AND IS WITHIN THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

Section 1 (b) of the Act defines employees coming under the Act so as to include those who have been in the service of the carriers within one year before the adoption of the Act. Respondents contend that

the inclusion of such persons is beyond the power of Congress under the Commerce Clause and is unreasonable and arbitrary (R. 7–8).

The court below held that the provision of the Act including these employees was unconstitutional as being without reasonable relation to interstate commerce, but that it was separable from the remainder of the Act and did not affect the validity of the Act as a whole (Conclusions of Law, 3, 4, R. 273; R. 264).

The inclusion within the Act of the employees in question is clearly reasonable when viewed in the light of the facts of the railroad industry which were before Congress when the Act was framed. The purpose of Congress was to include a group of persons who, upon the passage of the Act, were in such relation to the industry as to be properly classed as employees, though they were not then receiving compensation. It is a practice of the industry to grant employees who have been furloughed so-called "seniority" or "prior reemployment rights", that is, the last employee removed from the pay roll is the first to be recalled to service when a vacancy occurs (R. 201). In many cases this is provided for in contracts between employee organizations and the carriers (R. 183). Such furloughed employees are generally regarded as employees and in many cases are permitted to continue as members of mutual benefit associations, to contribute to group-insurance systems, and to con-

tinue to use free passes over the lines of their employers as well as over the lines of other carriers (*Ibid.*). In addition, in order to fill unexpected vacancies in certain classes of employment railroads are necessarily dependent upon a substantial number of employees being available at each place of employment; such employees are usually referred to as "extra" or "stand-by" employees (R. 183, 201). They are subject to call at all times and hold themselves in readiness for railroad service in preference to securing other employment (R. 183.)

The period of time during which employees are listed as retaining their seniority rights or are continued on the call list varies with the different carriers (R. 183). Where no contract exists, names are taken off the lists irregularly, as soon as an employee is furloughed, or once every six months, or annually, or at infrequent or indefinite periods (*Ibid.*). "In any event, there is always a body of employees not actively engaged in railroad service who regard themselves, and for most purposes are regarded by the carriers, as employees, and who would ordinarily be reemployed" (R. 183). "For all practical purposes, these extra employees although not necessarily on the pay roll, are essential to the proper conduct of the railroad industry" (R. 201).

Some of the earlier drafts of the Act included among employees subject thereto those having "reemployment rights". S. 3231, Section 1 (b); H. R.

9596, Section 1 (b), 73d Cong., 2d Sess. The provisions of the bills referred to were criticized by Mr. Eastman, who stated in the Congressional hearings: "The employees so included are defined in terms of retention of the right to reinstatement. These rights vary widely as between carriers. Our investigation has already developed that fact." Hearings on S. 3231, p. 158. Further he said: "The definition of 'employee' includes * * * those 'subject to call for employment' or who retain 'rights of employment.' These phrases would invite all manner of controversy. . The practices of the carriers in furloughing employees and permitting retention of rights differ very widely." Hearings on H. R. 9596, p. 35. And: "In general, the language is such as to result in penalizing the employees of carriers which were most drastic in reducing employment and most hardboiled in cutting names from extra boards." Hearings on S. 3231, p. 158. As a result, and upon the recommendation of the Director of the Labor Relations Section of Mr. Eastman's staff, the one-year provision now contained in the Act was adopted as a substitute, the one-year period being taken as a reasonable approximation of the usual duration of reemployment rights (R. 183, 201–202).

Respondents will urge that, as to these employees, those who are in fact recalled to service subsequent to the Act would receive the benefits of the Act in any case and that on this account the

provision of the Act was unnecessary. However, for the very reason that upon reemployment these employees would become entitled to annuity rights, Congress may well have feared that the failure to include the furloughed and so-called stand-by employees might cause many of them not to be recalled (R. 183–184). The fact that upon reemployment, they would have accrued prior service credits might lead railroads, in order to reduce pension costs, to discriminate against them in favor of persons with lesser prior service.

The court below found that during the year prior to the approval of the Act more than 146,000 of respondents' employees, other than those removed by death, left the service and have not returned; that a large number of these are permanently separated from carrier service, 8,065 having been discharged for cause, 21,158 having voluntarily resigned or left the service to engage in other employments, 5,066 having retired on account of age or disability, 19,786 having been only temporarily employed, 167 having left because their positions were abolished, 5,512 having left because of consolidations of forces abolishing positions, 2,645 having been seasonal laborers, and 95 having completed their apprenticeship (Finding 17, R. 269).

The only evidence supporting this finding consists of an affidavit (with two supplements) summarizing the responses to questionnaires sent to officers of the respondents (R. 49–51, 58–59, 137–

138). The character of this evidence is not such as would warrant the Court in overriding the judgment of Congress. The inclusion of persons other than those coming directly within the *purpose* of the provision in question (e. g. other than furloughed and extra employees) is not a burden upon respondents unless those persons both (1) do not in the future return to the railroad service and (2) have accumulated substantial prior service rights. Except for the latter the retirement fund will not be burdened; and with respect to the former, as to such of the employees in question who will return to service, they will obtain their pension rights in any case. No showing is made with respect to the length of prior service of those who, it is claimed, have permanently left the service. And the mere expression of opinion by respondents' officials, without more, that a large number of employees have permanently left the service is not convincing. Respondents' officials were asked in effect to guess whether particular employees who left the service during the year prior to the Act would or would not return to the service in the future. It is noteworthy that of those who, it was asserted, probably will not return, 17,538, or more than one-fifth had been laid off on account of force reductions (R. 138). The assertion that such employees generally will not return in the future seems incredible. It may be noted that respondents themselves did not request any finding with respect to this group

(R. 269). The weakness of the assertion with respect to this group also reflects upon the reliability of the judgments expressed as to the remaining persons involved. A large group are reported as having resigned, but reasons for resignations are not given. In the existing economic conditions, particularly in the railroad industry (see *Earnings and Standard of Living of 1,000 Railway Employees During the Depression,* R. 219, et seq.), resignation by itself is not at all indicative of permanent departure from the service. When employment is not sufficiently steady to provide a minimum of sustenance, employees may resign in order to obtain less desirable, but steadier, work until conditions are improved. With respect to the only other large group, temporary employees whose work was completed, it may not be assumed, in the absence of evidence, that their prior service is sufficiently substantial to burden the retirement fund.

The provision of the Act in question is reasonably designed to describe a class of persons whose inclusion as employees is within the power of Congress. Faced with a difficult problem of definition, Congress *acting upon expert advice* chose a provision which seemed to it best calculated to include those persons who ought to be included. That some additional persons may have been included because of the impossibility of exact segregation is not fatal to the constitutionality of the provision.

VIII

NONE OF THE OTHER PROVISIONS OF THE ACT ATTACKED BY RESPONDENTS IS UNREASONABLE OR OTHERWISE UNLAWFUL

Several of the other provisions of the Act are attacked in the bill of complaint. They were not ruled upon by the lower court but are considered in this brief in view of the expressed intention of respondents to renew their contentions with respect to them.

1. Payment of Annuities to Employees Who Shall Have Left the Service Prior to Retirement Age

Sec. 1 (b) defines an "employee" as "each person in the service of a carrier * * * who after the enactment hereof *shall have been* in such service." Sec. 3 provides that "each employee having attained the age of 65 years * * * shall be paid an annuity * * *". The Act thus contemplates that annuities shall be payable to employees at age 65, even though they do not continue in the service until that age. The amounts of annuities, as has been indicated, are determined, in any case, by the length of service. Respondents in their bill of complaint deny that the above construction of the Act is a proper one, but nevertheless assert that if the act is properly so construed it is unreasonable and arbitrary (R. 8).

It is clear from the language of Section 1 (b) and Section 3 that Congress deliberately provided for the payment of annuities commencing at the

retirement age, irrespective of whether the employee has continued in service until that age. The purpose of this provision and its relationship to an adequate retirement and pension system is obvious. One of the essential functions of such a system being to provide assurance to employees of old-age security, no real assurance of this kind is possible when pension rights may be lost at any time by loss of employment. In the absence of some provision such as that now being considered, employees might be laid off or discharged on the very eve of retirement and lose their pension rights (R. 186). Under such circumstances, the feeling of security, which it is the object of the Act to instill in the employees, could hardly be brought about. As stated by Mr. Latimer (R. 186):

> one of the most beneficial results which may come out of a system of retirement annuities, * * * is an enhancement of the feeling of security of the employees. Undoubtedly one of the most effective ways of reducing costs of production is to give the employees a feeling that their future is reasonably secure. If the threat that loss of jobs with the railways would mean loss of old-age income constantly hangs over the carrier employee's head, the feeling that old-age income is secure would largely disappear, and one of the greatest advantages of old-age insurance would be lost.

Under the provision of the Retirement Act the employee is assured that pension rights which have

accrued to him will not be lost. Such provision is reasonable, not because of benefits to employees after they have left the service but because it improves the morale of the employees while they are in the service. Here, again, Congress had the advantage of the views of industry. At the 1932 meeting of the United States Chamber of Commerce (*Employees' Retirement Annuities,* Chamber of Commerce of the United States, 1932, *supra,* p. 44), it was resolved in part that—

> A progressive step toward assuring the benefits of employee retirement annuities permits employees whose connection with an employer is terminated after a reasonable period of service to retain their annuity credits as a help toward provision for their old age.

It is interesting to note that a similar provision in a State law providing pensions for judges was recently upheld by the Supreme Court of the State of Illinois in the face of a constitutional prohibition against the payment of additional compensation after services are performed. *DeWolf* v. *Bowley,* 355 Ill. 530.

Employees discharged for cause.—Respondents object particularly (R. 8) that the provision of the Act in question does not differentiate between employees who have been discharged for cause and those whose separation from the service is due to other circumstances. Having in mind the purpose of this provision to provide definite assurance of

old-age security, there is little, if any, more reason for providing for the loss of accrued pension rights in case of discharge for cause than in case of discharge for any other reason. If, as has been shown, the assurance to the employees that pension rights, once earned, will not be lost is calculated to improve the morale of the employees, any proviso whereby pension rights would be lost by reason of discharge whether with or without cause would tend to defeat the purpose of the Act.

Furthermore, since there is not, and cannot be, any uniform standard of practice in the discharge of persons for cause, in fairness to employees and to insure uniformity in the application of the Act, any provison for loss of pension upon discharge for cause would probably require, in addition, some provison for official investigation of such discharges. The difficulty of administering such a provision, alone, would seem to justify the failure of Congress to provide any distinction between discharges for cause and for other reasons.

Employees of carriers which cease operations.— Respondents point also to the possibility that employees of carriers which cease operations will nevertheless receive pensions when they attain the age of 65. The court below found that 184 short-line railroads went out of existence during the past 13 years, and that since June 27, 1933, 25 more went out of existence (Finding 26, R. 271).

The court found further that the employees of all of these carriers would, under the Act, remain a charge upon the retirement fund (*Ibid.*). But the court was manifestly in error; the employees of carriers which ceased to exist before June 27, 1933, do not come under the Act, unless they are employed subsequently by a carrier subject to the Act. In the latter event, they fall in the same category as the 1,000,000 former carrier employees previously referred to.

The employees of carriers which ceased to operate subsequent to June 27, 1933 (which is one year prior to the passage of the Act), are clearly few in number. In 1932, a severe depression year, the number of miles of railroad of carriers which ceased operation was only 401 out of a total of 247,594 miles operated by all carriers. Interstate Commerce Commission, *Statistics of Railways*, 1932, pp. S–5, S–4. Furthermore, the pension rights of employees of carriers which ceased to operate during the year immediately preceding the passage of the Act are determined by their years of service. Thus, the charge upon the retirement fund for annuities for such employees will be negligible, and certainly not sufficient to affect the validity of the Act as a whole.

2. Optional Retirement After Thirty Years of Service

Under Section 3 of the Act, any employee after a service period of thirty years is entitled to

retire upon an annuity, the annuity in such case to be reduced by one-fifteenth for each year that the employee is less than 65 years of age at the time of the first annuity payment, unless the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. The court below found that respondents have, in the aggregate, 100,000 employees between the ages of 51 and 65 who have had thirty years of service (Finding 21, R. 270). Adopting respondents' contention (R. 9), the court found that "it is to the interest of the service of plaintiffs, and is to the interest of the public that those such employees who are competent and efficient be retained in carrier service for the benefit of their skill and experience" (Finding 21, R. 270).

The provision for the reduction of the amounts of annuities in cases of employees less than 65 may be expected approximately to compensate for the greater life expectancy (and consequently for the greater period during which annuities are likely to be payable) of persons retiring under 65 as compared with those who retire at 65 or over; thus the provision in question imposes no greater burden on the retirement fund (R. 185).

The justification for this provision is that employees who have completed thirty years of service may find it necessary, and it may be in the interest

of the industry, for them to retire before age 65 (R. 203). Under the voluntary pension systems, retirement is sometimes permitted to employees before the fixed retirement age (*Ibid.*). The reduced amount of the annuity in the case of retirement before age 65 may be expected to discourage such retirements unless they are reasonably necessary, because the employee will wish to continue at work until 65 in order to obtain his full annuity. The full annuity payable under the Act is not great, the maximum being only $120 per month (R. 184).

There would, therefore, appear to be little basis for respondents' contention that the provision for the optional retirement before age 65 of employees with thirty years' service will deprive the industry of many efficient skillful workers. Clearly, the provision in question is not arbitrary and unreasonable so as to be unlawful.

3. Inclusion of Employee Representatives Under the Act

Section 1 (b) defines employees to include officers and other official representatives of employee organizations, who have performed service for a carrier and who are duly authorized to represent employees under and in accordance with the Railway Labor Act. Section 7 provides that such employee representatives shall have the option of becoming, or continuing to be, beneficiaries under the pro-

visions of the Act, except that they must pay both employee and carrier contributions.[36] Respondents attack the inclusion of employee representatives under the Act upon the claim that the average age of employee representatives is greater than the average age of carrier employees (thus, on the average, being nearer the retirement age), as a consequence of which it is alleged that the carriers will be compelled to pay a part of the costs of pensioning the employee representatives (R. 11). The court in its findings of fact refused to find that the inclusion of employee representatives "will" constitute a substantial burden on the fund, but found that it "may" constitute such a burden (*Ibid.*).

The evidence in the record is conflicting, and it is submitted that adduced by respondents and relied upon by the court below is too insubstantial to form the basis of a ruling against the validity of the provision of the Act in question. The only evidence adduced by respondents is contained in

[36] Special provision is made in Section 7 for the computation of the basic compensation of such employee representatives for the purpose of computing retirement annuities, but no question is raised with respect to this. It should be noted that Section 7 is drawn upon the assumption that employee representatives generally have rights to be reemployed by the carriers. The basic compensation of an employee representative for the purposes of Section 7 is fixed at "that compensation paid by the carrier for service rendered in the position to which the rights of such representative would entitle him * * *"

the affidavit of Mr. McClees (R. 149), that the average age of some 640 employee representatives whose age records were available was 51 years and 3 months; and the testimony of Mr. Parmelee (R. 45), that in 1932, two years before the Act was passed, the average age of respondents' employees was 42.99 years. Mr. Eddy, for petitioners, points out that when the Act took effect there were 167,000 less employees than in 1932, and that, in view of the practice in the industry in reducing forces to lay off employees in the lower age brackets, it is likely that the average age of all railway employees when the Act took effect was substantially higher than that stated by Mr. Parmelee (R. 194). Mr. Eddy points out, also, that the 640 employee representatives referred to by Mr. McClees represent but a small sample of all the employee representatives in the industry, the total number, full time and part time, being in excess of 10,000 (R. 195). There are not less than 1,500 full-time employee representatives (R. 11). Mr. Eddy states that in his judgment there is very little difference between the average age of employee representatives as a whole and the average age of all employees in the railroad industry (R. 195).

The fact that only those employee representatives are permitted to come under the Act who have formerly been railway employees indicates the purpose of the provision in question. It is a known fact that the principal employee organizations have

in practice, for many years, chosen to be represented exclusively by railway employees. Railway employees might be loath to surrender their rights under the Act in order to become employee representatives; and this would interfere with the proper functioning of the policies of the Railway Labor Act, the validity of which this Court sustained in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, *supra*. The power of Congress to avoid conflict between the policies of the two Acts, even if at some cost to the industry, would seem clear. It is pertinent to note in this connection that under the voluntary pension systems of the railroads, absence from active service on account of engagement in employee organization work is not regarded by many roads as constituting a break in the continuity of service such as to make an employee ineligible for a pension; and some roads authorize inclusion in the employee's period of service, for pension purposes, all time spent by him in employee organization service (R. 192).

4. The So-called "Pooling" of the Carriers' "Funds and Affairs"

Because the Act provides (Secs. 5, 8) for the payment of all contributions into a common fund; and because amounts of annuities are made to depend on the service periods of the employees, time spent in the service of any carrier subject to the

Act being made a part of the employee's service period (Sec. 1 (f)), respondents contend that there is an improper "mingling" and "pooling" of their "affairs and funds" and the service periods of their employees (R. 10).

There can be no objection to the mere establishment of a common fund from which annuities are to be paid. Respondents' objection is, rather, that the Act prescribes an improper measure for determining carrier contributions to the fund. Carrier contributions are in effect made proportionate to their pay rolls (Sec. 5).

Insofar as it is the purpose of the Act to promote efficiency and safety in interstate transportation, it is concerned not with individual carriers but with railroad transportation as a whole. That Congress may regulate the railroads with an eye to improvement and development of railway service as a whole has been shown. Where, as is the case with interstate carriers in this country, common facilities are used, and through routes exist, interaction among the carriers is bound to exist. To the extent that any link in the transportation chain may be lacking in efficiency, the transportation system as a whole is affected.

Since the railroads (as well as the public) have a common interest in the efficient performance of the transportation system as a whole, it is proper and necessary to require them to contribute to the

cost of the plan which is designed to that end, without regard to the distribution among them of superannuated employees at the present time and regardless of differences in age classifications or service periods of their particular employees.

The pooling principle is desirable for the additional reason that there are a great many small carriers, the number of employees of which is too small to permit a separate retirement plan for each carrier (R. 204). In an industry-wide system, any attempt, in determining carrier contributions, to give particular consideration to differences in age classification and service periods of employees would involve great administrative difficulties and would unduly increase costs of administration (R. 188).

The evidence.—The fact is, however, that, despite respondents' assertion to the contrary, there is strong evidence of the absence of any substantial differences between the age classifications and service periods of the employees of the different carriers. A study made among the employees of seven large carriers, well distributed geographically and not specially selected, shows (R. 189) a remarkable tendency to uniformity in the "most probable" age of entry into service of their employees, the "most probable" age upon completion of thirty years' service, also in the ages at which the greatest number of employees entered the service, and com-

pleted thirty years of service. From this study, Mr. Latimer concluded that (R. 189):

> in the long run there will be no appreciable difference in costs as between these carriers and I know of no reason to suppose that the employment policies of other carriers will not be reasonably consistent with the policies of the seven roads considered in the study.

He had pointed out earlier (R. 188) that the employment conditions of many carriers have been given a considerable degree of uniformity by the influence of national employee organizations.

It may be noted that the lower court declined to make a finding, requested by respondents, that there is a wide variance among the different carriers in age classifications of their employees, and in respect to the past service periods of their respective employees (R. 271).

Respondents showed, and the court found (Finding 24, R. 270–271) that the employees now over 70 years of age who are required to retire forthwith are unevenly distributed among respondents and that some of respondents who have no such employees will nevertheless, in effect, be required to contribute toward their annuities. However, as Mr. Latimer points out (R. 188), the fact that there is at the present time in the service of the carriers some variation in numbers of persons who are over retirement age is no criterion of ultimate cost, and the cost differentials which

are involved are negligible as compared with the total cost.

The decisions.—The legality of the pooling principle, when reasonably applied, is well settled. In *Mountain Timber Company* v. *Washington*, 243 U. S. 219, employers were required to make contributions on the basis of pay rolls to a State workmen's compensation fund, the contributions of the employers being segregated according to industries. It was contended that the effect of the requirement was to make some employers pay for the accidents occurring in the plants of other employers. Answering this contention, this Court said (p. 244):

> In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plan or work, to impose the burden *upon the industry* * * *. (Italics supplied.)

The principles of pooling were extensively considered by the Court, and much that the Court said in its opinion supports the provisions of the Retirement Act. The *Mountain Timber* case was followed in *Thornton* v. *Duffy*, 254 U. S. 361.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, this Court upheld a statute which required banks to contribute a uniform percentage of their deposits to a State guarantee fund for the purpose

of making good losses to depositors of any of the banks which might become insolvent.

In *New England Divisions Case,* 261 U. S. 184, the Court held that it was proper for the Interstate Commerce Commission, in prescribing the division of joint rates between groups of carriers to give consideration to the financial needs of a weaker group, in order to maintain the latter in effective operation as part of the national transportation system.

In *Dayton-Goose Creek Railway Company* v. *United States,* 263 U. S. 456, the Court upheld the provision of the Transportation Act, 1920, requiring carriers to contribute one-half of their "excess earnings" to a revolving fund to be used by the Interstate Commerce Commission, "in furtherance of the public interest in railway transportation", for making loans to carriers to meet capital expenditures and to refund mature securities, or for purchasing equipment and facilities and leasing them to the carriers.

In *Atlantic Coast Line Railroad Company* v. *Riverside Mills,* 219 U. S. 186, this Court upheld the validity of the Carmack amendment to the Interstate Commerce Act which provided that the initial carrier should be liable to the consignor for the loss of goods contracted to be delivered over connecting lines. The carrier argued that this was imposing liability without fault, and required it to pay for losses occurring on the lines of other car-

riers. In sustaining the amendment, the court referred, among other things, to the right of reimbursement from the carrier responsible for the loss, but added (p. 205):

> that there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation.

The conclusion is well warranted that the so-called pooling provisions of the Retirement Act are reasonable and valid.

IX

THE RETIREMENT ACT DOES NOT INTERFERE WITH THE LIBERTY OF THE CARRIERS TO CONTRACT WITH THEIR EMPLOYEES WITH REFERENCE TO WAGES

Respondents allege in substance (R. 8–9) that the effect of the Retirement Act is to compel them to pay to their employees wages in addition to those agreed upon. The contention that on this account respondents are deprived of their liberty of contract and of their property without due process of law may be dealt with summarily.

Respondents in the court below relied upon the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, holding invalid a minimum wage law applicable to the District of Columbia. It is clear that the Retirement Act does not either directly or indirectly fix the amounts of wages to be paid by respondents. Just as in the case of a statute regu-

lating hours of labor (see *Bunting* v. *State of Oregon*, 243 U. S. 426; cf. *Wilson* v. *New*, 243 U. S. 332), the Retirement Act leaves the respondents free to bargain with their employees with respect to amounts of wages to be paid under the changed circumstances brought about by the Act. It is reasonable to infer that the new law will be advanced by the carriers in the negotiation of future wage agreements.

In any event, with respect to any claim of impairment of contracts already made, it is well settled that contracts between private individuals "must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467, 482, quoting from *Knox* v. *Lee*, 12 Wall. 457, 551. See also *Philadelphia, Baltimore & Washington Railroad Company* v. *Schubert*, 224 U. S. 603, 613–614; *New York* v. *United States*, 257 U. S. 591, 600–601; *Highland* v. *Russell Car Company*, 279 U. S. 253, 261; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 427–435.

X

ENACTMENT OF THE RETIREMENT ACT AT THIS TIME IS NOT UNREASONABLE BY REASON OF THE PRESENT FINANCIAL CONDITION OF THE CARRIERS

Respondents devote a substantial portion of their bill of complaint to allegations with respect to the

financial condition of the carriers, for the purpose of showing "the arbitrary nature of the Act under existing circumstances" (R. 11–13). At the request of respondents, the trial court made findings of fact with respect to the number of miles of railroad in the hands of receivers or trustees in bankruptcy, the earnings of Class I carriers during the years 1932 and 1933 and the first six months of 1934, and the composite rate of return earned by Class I carriers on their investments in the years 1932 and 1933 (Finding 29, R. 272).

The financial condition of the carriers at the time of the passage of the Act was a matter of common knowledge. Many carriers were, and still are, in straitened circumstances. Through the enactment of the Emergency Transportation Act of 1933, *supra*, Congress undertook to provide ways and means of improving their condition. Through the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 5), Congress made provision for the lending of money to the railroads. That Congress was fully aware of the facts upon which respondents rely is, therefore, evident. That those facts were taken into consideration in the drafting of the Retirement Act is evidenced by the following statement contained in the report of the Senate Committee, *supra* (p. 4):

> The substitute bill aims at this time and during the 4 years' experience period to impose the least possible burden on the railroads and the employees. It proposes to

meet current obligations in the payment of annuities to employees who shall retire under those provisions from current contributions during such experience period.

No case has been found in which a regulation (other than rate regulation), otherwise valid, was held invalid because of the complaint that the plaintiff could not bear the cost. In any event, respondents' reliance upon conditions during the depression years is misleading. They are seeking to induce the Court to hold invalid, on the basis of conditions during a temporary period, a statute intended to apply indefinitely in the future. Respondents will be the last to assert that the railroad industry is a dying industry. It cannot matter that the earnings of the carriers during the past two or three years have been low, unless it is reasonable to assume that the years in question are typical of those during which the Act will apply. This Court will not assume that the economic conditions of the recent past are here to stay. It is common knowledge, also, that with improvement in economic conditions net revenues of the railroads tend to improve rapidly, due to the fact that great quantities of additional traffic can be handled with comparatively little increase of facilities

One of respondents' officials described in some detail the operating economies which have been introduced by the carriers since 1929, from which he concludes that transportation by railroad in the

United States is now being conducted more efficiently (i. e., at a lower unit cost) than ever before (R. 73–75). He stated in part that (R. 74):

> In maintaining the stability of the operating ratio [of expenses to revenues] during the past four years of economic depression, the carriers reduced operating expenses by $575,000,000 in 1930, by an additional $708,000,000 in 1931, by an additional $820,000,000 in 1932, and still further by $154,000,000 in 1933. The reduction in 1933, as compared with 1929, amounted to $2,257,000,000, or 50.1%. This compared with a 50.7% decline in revenues.

Mr. Eastman stated (R. 156):

> A marked revival in general business would do more than anything else to help the railroads, and they would profit very quickly from such a revival, because they now have their affairs in such shape that they can operate more cheaply than they did in 1929.

There is no reason to believe, therefore, that the carriers will not be able, in normal years, to pay the costs of the Retirement Act. When it is considered that the employees (and surely their financial condition at the present time is even more unfavorable than that of the carriers)[37] have will-

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[37] See Goodrich, United States Department of Labor, *Earnings and Standard of Living of 1,000 Railway Employees during the Depression*, 1934, R. 219 et seq.

ingly accepted the requirement that they contribute one-half the sum to be paid by the carriers, amounting to approximately $30,000,000 in employee contributions during the first year, it is difficult to conclude that the carriers cannot make their contributions.

It must be remembered that the Retirement Act will undoubtedly produce actual savings in pay rolls and may be expected to improve efficiency in numerous other ways (*supra*, pp. 70–72), so that it may not be assumed that the expenditures required to be paid under the Act, even at the outset, represent the net cost of the Act to the carriers. Furthermore, there is reason to believe that the Retirement Act may have some effect in helping to attain economies contemplated by the Emergency Transportation Act of 1933,[28] which otherwise it might not be possible to accomplish. In this connection, Mr. Eastman, although he believed that the adoption of the Act "could well be deferred", states that (R. 161–162):

> The Act is sound in general principle, and it will not be so much of a burden upon the railroads as they would have the Court be-

[28] See the long list of possible economies through coordination of carrier operations contemplated by the Emergency Act, referred to in the testimony of Mr. Eastman in hearings on the Emergency Act, and quoted in the House Committee report on that Act (No. 193, 73d Cong., 1st Sess., p. 10).

lieve. The retirement of superannuated employees through this Act—and there are many such employees in the railroad world—will give opportunities for younger men and more efficient men, *and it will also make it easier to obtain economies in operation which are quite possible of accomplishment.* (Italics supplied.)"

In view of the fact that the greater part of all operating expenses of carriers is devoted to the payment of wages (Annual Report, Interstate Commerce Commission, 1933, p. 92), the introduction of further economies through coordination of carrier operations, as contemplated by the Transportation Act of 1933, must be largely at the expense of employees through elimination of positions. However, in view of the serious unemployment situation in the industry (R. 204), Section 7 (b) of the Emergency Act [39] expressly forbids the wholesale discharge of employees in the course of the elimination of unnecessary operations or the coordination of functions. The retirement of superannuated workers will permit carriers to transfer to their places employees whose positions

[39] Section 7 (b) is as follows: The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May 1933, after deducting the number who have been removed from the pay rolls after the effective date of this act by reason of death, normal retire-

it is desired to abolish. In this way coordination can proceed farther than would otherwise be possible (R. 205).

In view of all of the factors confronting and considered by Congress when the Retirement Act was adopted, it cannot reasonably be said that the Act—whether considered alone or as a part of the general plan to rehabilitate the railway industry—is an undue or arbitrary burden placed upon the carriers under present conditions. The language of the Court in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 351–352, is pertinent here:

> But even if the Court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the Act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the Court may and ought to refuse the enforcement of the provisions

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ments, or resignation, but not more in any one year than 5 per centum of said number in service during May 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May, or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

of the Act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this Court has no function to supervise such legislation from the standpoint of wisdom or policy.

CONCLUSION

It is apparent that the retirement and annuity system embodied in the Act is not a hastily concocted device but is rather the product of many years of experience with industrial and governmental retirement and pension plans. There is little conflict in the record. The proof is clear that the system established by the Act is calculated to promote efficiency, economy, and safety in interstate transportation. This being, as well, the essential intent of the Act, there can be no question of the power of Congress under the commerce clause of the Constitution to adopt it. Since Congress has power to improve the national transportation system as a whole, it was clearly authorized to include under the Act all of the employees of the carriers. With respect to the remaining provisions of the Act which were attacked by re-

spondents, it becomes evident as respondents' contentions are examined that they are directed largely at the wisdom of the particular provisions adopted by Congress. There has been shown to be a substantial basis for each of them; viewed together as parts of a unified whole, each of them would seem to be reasonably adapted, if not essential, to the establishment of a sound and adequate retirement and pension system.

That Congress might have selected other provisions more to respondents' liking does not affect the validity either of the Act as a whole or of any of its provisions. As this Court said in *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire*, 219 U. S. 549, 569:

> The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative consideration in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

It is respectfully submitted that the decree below should be reversed and the cause ordered remanded

to the trial court, with directions to dismiss the bill of complaint.

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APPENDIX

The Railroad Retirement Act of June 27, 1934, c. 868, 48 Stat. 1283, provides as follows:

AN ACT

To provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business

of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means each person in the service of a carrier, subject to its continuing authority to supervise and direct the manner of rendition of his service, who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service. The term "employee" also includes each officer or other official representative of an "employee organization" herein called "representative", who has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during, or following employment by a carrier, is engaged in such representative service in behalf of such employees.

(c) The term "Board" means the Railroad Retirement Board hereby created.

(d) The term "annuity" means regular payments at the end of each completed month during retirement, ceasing at death or at resumption of compensated service.

(e) The term "service" means the employment relation between an employee and a carrier whether before or after the enactment hereof.

(f) The term "service period" means the total service of an employee for one or more carriers whether or not continuously performed, and includes as one month every calendar month during which the employee has been paid compensation by a carrier and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(g) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(h) The term "age" means age at the latest attained birthday.

(i) The term "carrier contribution" means the payment to be made by each carrier.

(j) The term "employee contribution" means the payment to be made by each employee.

(k) The term "voluntary contribution" means the payment made by an employee equal to the total of both the employee and the carrier contribution.

(l) The term "effective date" means the 1st day of the second month after the taking effect of this Act.

(m) The term "Railroad Retirement Act" means and may be used in citing this Act and subsequent amendments thereto.

PURPOSES

SEC. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in

interstate transportation, and to make possible greater employmen opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this Act to perform and fulfill the obligations imposed thereby. This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

SPECIAL REPORT

(b) Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy and permanency of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations.

ANNUITIES

SEC. 3. Each employee having attained the age of sixty-five years, or having completed a service period of thirty years, shall be paid an annuity, to begin on a date specified in a written application, which date shall not be more than sixty days before

the making of the application. No annuity shall begin less than six months after the effective date. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the number of years of service, not exceeding thirty years, by the following percentages of the monthly compensation: 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the compensation in excess of $150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee has received compensation from any carrier out of eight consecutive calendar years of such services ending December 31, 1931. No part of any monthly compensation in excess of $300 shall be recognized in determining any annuity for any employee contribution. The annuity shall be reduced by one-fifteenth of such annuity for each year the employee is less than sixty-five years of age at the time of the first annuity payment. No such reduction shall be made if the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. Upon death of an employee before or after retirement an amount, equal at his death to a computation, with interest at 3 per centum compounded annually, of the accumulation from his payments, less any annuity payments received by him, shall be paid as he may have designated or to his legal

representative. Any employee who upon retirement shall be entitled to an annuity with a value determined by the Board of less than $300 shall be paid such value in a lump sum.

Retirement

Sec. 4. Retirement shall be compulsory upon employees who, on the effective date, have attained or thereafter shall attain the age of sixty-five years. The carrier and the employee may, by an agreement in writing filed with the Board, extend the time for retirement as to such employee for one year and for successive periods of one year each, but not beyond the age of seventy years. Until five years from the effective date, the compulsory retirement shall not apply to an employee who from and after the effective date occupies an official position in the service of a carrier.

Contribution

Sec. 5. Each employee shall pay an employee contribution in a percentage upon his compensation. Each carrier shall pay a carrier contribution equal to twice the contributions of each employee of such carrier. The employee compensation shall be the compensation for service paid to such employee by the carrier excluding compensation in excess of $300 per month. The contribution percentage shall be determined by the Board from time to time, and shall be such as to produce from the combined employee and carrier contributions, with a reasonable margin for contingencies, the amount necessary to pay the annuities, other disbursements and the expenses becoming payable from

time to time. Until the Board shall determine on a different percentage the employee contribution percentage shall be 2 per centum. Employee contributions shall be deducted by the carrier from the compensation of its employees and shall be paid by the carrier, together with the carrier contributions, into the Treasury of the United States quarterly or at such other times as ordered by the Board.

EXISTING PENSION SYSTEMS

SEC. 6. The Board shall have the power to provide by appropriate rules and regulations for substituting the provisions for annuities and other benefits to employees under this Act, for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and to transfer such obligations to the retirement system herein established. If the fulfillment of any such transferred obligation shall require additional contributions or larger payments than would otherwise be required under the provisions of this Act, then such additional contributions shall be made by the carrier originally responsible for the creation of such obligation or for the excess amount of such payments over those which would be required under the provisions of this Act. In the event that the Board is unable to make satisfactory arrangements with any carrier for the substitution of the provisions under this Act for its existing pension system, then, and in that event, the provisions of

this Act shall be applied to said carrier and its employees without regard to any conflict or duplication in the operation of such an existing pension system and the operation and effect of the provisions of this Act: Provided, That the Board, at its option, shall have power, in lieu of the foregoing provisions of this section, to order that all former employees of carriers, who prior to the effective date have become separated from the service at the age of seventy years or over and who may or may not be receiving age retirement benefits, shall be entitled to the benefits of this Act.

EMPLOYEE REPRESENTATIVES

SEC. 7. Any representative of an employee organization who is included within the definition of "employee" in paragraph (b), section 1, of this Act shall have the option, but, shall not be required to continue or to become a beneficiary under the provisions of this Act. If he shall elect to continue or to become such a beneficiary he shall pay all voluntary contributions.

For the purposes of this section the requirements of section 4 of this Act shall not apply. Service rendered to an employee organization shall be included in computing the total service period of such representative.

For such representative who shall elect to become a beneficiary under this Act, the basic compensation upon which contributions shall be made and benefits calculated shall be that compensation paid by the carrier for service rendered in the position to which the rights of such representative would entitle him for the period defined in section

3 of this Act: Provided, That if no definite and specific rights obtain, the average compensation paid to the four employees whose last date of entry in the service is nearest the date of entry in the service of the same carrier by such representative, shall be his basic compensation to be determined for the period defined in section 3 of this Act. When a question arises as to rights under this provision the Board shall investigate and determine rights of such representative.

For such representative who elects to continue as a beneficiary under the provisions of this Act, his basic compensation shall be the average monthly compensation paid to him by the carrier during the last twelve months of active service with such carrier.

RETIREMENT FUND

SEC. 8. All moneys paid into the Treasury under the provisions of this Act, all interest, and other receipts, and all refunds of moneys paid out under this Act shall constitute and be kept in a separate fund in the Treasury to be known as the "railroad retirement fund." At the request and direction of the Board, the Treasurer of the United States, with the approval of the Secretary of the Treasury, is authorized to invest such funds as are not immediately required for disbursements in interest-bearing bonds, notes, or other obligations of the United States, and to collect the principal and interest of such securities and to sell and dispose of the same as in the judgment of the Board shall be in the interest of said fund. There is hereby appropriated such sums not in excess of the

amounts in said fund as may be necessary to pay all annuities, other disbursements, and the expenses of administration of this Act.

RETIREMENT BOARD

SEC. 9 (a) PERSONNEL.—There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years, without recommendation by either carriers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of em-

ployees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act. The members and employees of the Board shall be included as employees under this Act and together with employees receiving annuities shall be furnished free transportation in the same manner as such transportation is furnished to employees.

(b) DUTIES.—The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall receive and take such steps and institute and prosecute such proceedings and actions as may be necessary to enforce the payments and obligations required under the Act, make and certify awards and payments, and account for all moneys and funds necessary thereto. The Board may require such advances upon the payments of carriers as necessary to put this Act into operation. The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated therefor, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments, and shall maintain such offices, provide

such equipment, furnishings, supplies, services, and facilities and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board and shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the payments to be required to provide for all annuities, other disbursements and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

COURT JURISDICTION

SEC. 10. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by the Board to compel an employee or other person residing within the jurisdiction of said court, or a carrier subject to service of process within said jurisdiction, to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this Act.

(b) An application by an employee or carrier to the Supreme Court of the District of Columbia or to the district court of any district wherein the Board maintains an office or has designated an agent authorized to accept service in its behalf, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take an action, or to make a decision necessary for the enforcement of a legal right of the applicant, when the applicant shall establish his right to a judicial review upon the jurisdictional ground that, unless he is granted a judicial review of the action or decision, or failure of the Board to act or to decide, of which he complains, he will be deprived of a constitutional right to obtain a judicial determination of his alleged right.

(c) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

EXEMPTION

SEC. 11. No annuity or death payment shall be assignable or be subject to any tax or to garnish-

ment, attachment, or other legal process under any circumstances whatsoever.

PENALTY—CARRIER

SEC. 12. On the failure of any carrier to make any payment when due under the provisions of this Act, such carrier, unless excused by order of the Board, shall pay an additional 1 per centum of the amount of such payment for each month such payment is delayed.

OTHERS

SEC. 13. Any employee, other person, officer, or agent of a carrier subject to this Act, who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act or who shall willfully fail or refuse to make any accounting required under this Act, or who shall knowingly make any false or fraudulent statement or report required for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act shall be punished by a fine of not less than $100 nor more than $10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

U. S. GOVERNMENT PRINTING OFFICE: 1938

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 566

RAILROAD RETIREMENT BOARD ET AL., PETITIONERS

v.

THE ALTON RAILROAD COMPANY ET AL.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONERS

Respondents' brief rests their attack on the constitutionality of the Railroad Retirement Act on grounds which have been anticipated and considered in petitioners' main brief. A detailed reply to respondents' contentions seems unnecessary. But the issues will be sharpened by a concise summary of the positions of the parties, together with comments also upon certain contentions of respondents which, it is believed, are not well founded.

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I

POWER OF CONGRESS

Petitioners' brief supports the Railroad Retirement Act as a reasonable exercise of Congressional power under the commerce clause on the ground that the Act is reasonably calculated to promote efficiency, safety, and economy in interstate transportation, to improve labor conditions and labor relations in the industry, and to foster and protect the national transportation system. Respondents do not deny that Congress has the power to legislate for these purposes. They concede (Brief, p. 17) that "The announced purpose of promotion of efficiency and safety in interstate transportation is within the commerce power if that purpose be genuine", but they assert that this purpose, stated in Section 2 (a) of the Act, is not genuine.

That the stated purpose is genuine and that the Act is reasonably calculated to achieve the above aims is demonstrated in detail in petitioners' main brief. The retirement and annuity system established by the Act will remove superannuation from the industry; will safeguard the industry (with its peculiar tendency toward superannuation) against such conditions in the future; will open opportunities for employment of vigorous younger men and for the advancement of employees in service; will remove or reduce employees' worry over their support in old age; will tend to improve labor relations; will promote continuity of employ-

ment in the industry; will safeguard against uneconomic expenditures through "hidden" pensions to inefficient aged workers retained on pay rolls, and through inadequate pension systems; will avoid the consequences of the threatened breakdown of the existing voluntary systems; and will make possible railroad rehabilitation through coordination, by removing obstacles interposed by humane considerations, labor opposition and section 7 (b) of Emergency Railroad Transportation Act, 1933. In all these ways, the Retirement Act promotes efficiency, safety and economy and makes for a more adequate national transportation system.

Despite this variety of influences for efficiency, safety, and economy, respondents assert (Brief, p. 22) that petitioners' argument "depends on the assertion of one or both of two theories * * * to establish any relation to efficiency or safety": (1) that the Act is reasonably calculated to accomplish the elimination of "asserted excessive superannuation among railroad employees"; (2) that the "assurance of future pensions will have a present effect in ease of mind and removal of fear of old-age dependency, thus creating a state of mental contentment of employees, which, it is asserted, will tend to contribute to the efficiency of their work." They then urge (1) that in its very nature and provisions the Act has no relation to efficiency and safety, (2) that the "theory of elimination of superannuation fails as a basis of constitutional power"; and (3)

that what they call the "contentment theory" gives the Act no real or reasonable relation to efficiency or safety.

1. *Nature and provisions of the Act.*—Respondents' argument on this point is based on a distorted and incomplete view of some features of the Act. They assert that the Act promises pensions to over 1,000,000 men who "are not even employed by the carriers." (Brief, p. 20.) But there is no reason for segregating this number from all other persons who will be employed by respondents in the future; pensions will accrue to all of them only in the event of future employment and service.

Respondents assert further that the lack of relationship to efficiency and safety is shown by the fact that annuities are payable at age 65 to employees who are separated from service prior to that age either voluntarily or by discharge (Brief p. 21). This objection isolates an established incident of sound retirement plans and ignores its function in the whole. The objection focuses attention on the time of the pension payments and does not consider the effect during the years of employment prior to their commencement. It considers the effect on the specific individual receiving the pension without taking into account the effect on the personnel generally. As stated in petitioners' main brief, the pension in any case is measured by the years actually spent in service. Allowance for the retention of pension credits after separation from service has recently been recom-

mended as "a progressive step toward assuring the benefits of employee retirement annuities" (Petitioners' brief, p. 133).

It is a reasonable incident designed to prevent pension plans from being illusory, to give to the employees generally assurance, conducive to efficiency during their employment, that their pension credits are real, and to avoid unjustly penalizing separations from service by forfeiture of earned credits.

2. *Elimination of Superannuation.*—Respondents deny that there is presently an excess of superannuation in the railroad industry. Seizing on the word "probably" in the Coordinator's affidavit they attack his statement as a mere opinion. That their charge is unwarranted is shown in the Coordinator's Report of January 21, 1935, where the Coordinator unequivocally states that the superannuation is excessive and supports his statement with undeniable facts (Report of the Federal Coordinator of Transportation, 1934, House Document No. 89, 74th Congress, 1st Sess., p. 80). Without challenging the validity of the data showing that superannuation in the railroad industry is greater than that in comparable industries, the respondents rely merely on comparisons with non-comparable industries (Respondents' Brief, p. 25; see Petitioners' Brief, p. 66), and with occupations such as grocers, hucksters, peddlers, and others (The 15th Census of the United States, 1930, v. 5, pp. 130–133). On the basis of careful study, the

Coordinator (Report of the Federal Coordinator, *supra*, p. 80) states:

> The average age of railroad employees is higher, and the proportion of those aged 65 and over is greater, than for any other major industrial group. Other conclusions may be drawn from age data collected by the United States Census of 1930; but such conclusions would be based on an incorrect use of census materials, and contrary to fact.

The evidence that the percent of superannuation in the railroad industry has been increasing, that it is now larger than it ever has been in the past, that the average age of railroad employees is higher than that in other industries, that the railroad industry, because of its age, tradition and employment rules, is peculiarly subject to a tendency toward superannuation, is not denied. At best respondents' contention is that superannuation in the railroad industry is not greater than that in certain other industries.

Respondents object that no point can reasonably be made with respect to the percentage of superannuation during the recent depression years, which, they say (Brief, p. 26) "does not indicate the condition of the industry during the period for which the act is to obtain—all time to come." But the Coordinator's Report (p. 80) shows that the tendency toward excessive superannuation is inherent in the railroad industry, and that the depression "merely hastened the inevitable."

Respondents contend further that removal from service on the basis of mere age has no reasonable relation to either efficiency or safety (Brief, p. 23). The contention is contrary to long industrial experience and the respondents' own practice. The Retirement Act requires retirement at age 65, permitting extension, however, by consent of employer and employee until age 70. The evidence discloses that these ages are those commonly fixed for retirement under the voluntary industrial pension plans generally. Many of respondents make retirement compulsory on the basis of mere age (R. 197 and attached statement). Respondents, indeed, point to the fact that 56 of them, employing 62.9% of all railroad labor had, on the passage of the Act, no employees over age 70 (Respondents' Brief, p. 8). The judgment of Congress in accord with this experience cannot be impugned.

But respondents urge that if the removal of old employees is conducive to efficiency and safety, retirement alone would accomplish that result and the further requirement of pensions has no relation to it and is beyond the power of Congress (Brief, p. 33). As has been shown (Petitioners' Brief, pp. 90–91) compulsory retirement is, as a practical matter, inseparable from provision for pensions. If Congress has power to require retirement it has power to do so in a practicable manner. A power which cannot be exercised in a feasible way is wholly illusory. The respondents' argument is in

the teeth of the classic language of the *Second Employers' Liability Cases*, 223 U. S. 1, 47, frequently repeated by this Court, that the power to regulate commerce is the power to foster, preserve, protect, and control "with appropriate regard for the welfare of those who are immediately concerned * * *." On respondents' analysis, the Adamson Act should have been declared invalid in *Wilson* v. *New*, 243 U. S. 332, because the power of Congress to avoid the crisis there threatened was confined to a prohibition of the impending strike; there the statute did not prohibit the strike, but instead fixed wages and hours of labor. Moreover, respondents' contention disregards the beneficial effects of a retirement and annuity system listed above—effects depending upon the payment of pensions and not alone upon retirement.

3. *The So-called "Contentment Theory."*—This theory which respondents attribute to petitioners and characterize as fanciful is respondents' own creation. Their attempt to reduce the record, and petitioners' brief, to a contention that efficiency will be promoted simply through "mere general contentment" discloses a failure to appreciate the diversity of influences, exerted by a retirement system, toward improvement of employee personnel and morale. This is illustrated further by their treatment of the quotation from the Industrial Conference Board (Brief, p. 38) where by italicizing the element of "loyalty"—that is, gratitude for a gratuity and fear of losing it through

separation from service—they overlook the other elements emphasized there and detailed above.

Bearing of the Voluntary Plans.—The Government has placed reliance on the voluntary plans for two reasons: first, to show that the Railroad Retirement Act will promote efficiency through features common to such plans and, secondly, to show that Congress did not introduce a retirement and pension system into the railroad industry, but rather acted upon an existing situation and provided for its improvement. Respondents urge that the voluntary plans "furnish no support to the argument that the Act has reasonable relation to efficiency and safety" (Brief, p. 42). They renew their contention that the voluntary plans promote efficiency and safety only through promoting loyalty and continuity of service and that the Act destroys both these features. It has been shown in petitioners' main brief that insofar as respondents concentrate on these two influences they overlook the advantages of pension systems commonly recognized outside of this litigation and assured by the Act.[1]

[1] It is illuminating to compare respondents' contentions in this litigation, as to the severely limited objectives of voluntary pension plans, with the convictions current throughout the years when those plans were being adopted. Thus, among the advantages to the railroad of the Baltimore and Ohio pension system, S. R. Barr, Superintendent of the Relief Department, in a pamphlet entitled, *The Relief Department of the Baltimore & Ohio Railroad Co.; Its Advantages to the Company* (March 12, 1909), stated the following: "The replacement of the pensioned by younger men eliminates the

Furthermore, respondents exaggerate the alleged difference between the Retirement Act and the existing railway pension plans with respect to inducing continuity of service. As was stated in petitioners' main brief (p. 77), the Retirement Act is likely to encourage continuity of service in the industry (at least to the extent [Brief, p. 76] that the voluntary plans have that tendency with respect to individual employers), and if the employee

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nonproductive labor" (p. 13). "The Pension Feature takes out of the service men who are past giving full value for the wages paid them. The replacement of these by younger men insures the Company a better return for the wages paid. The operating departments are relieved of the burden of carrying these men on their rolls" (p. 24). And see Emory R. Johnson, *Railway Departments for the Relief and Insurance of Employees*, Annals Amer. Acad. Pol. & Soc. Sci., Vol. 6, pp. 424, 443–444 (1895); Samuel M'Cune Lindsay, *Railway Employees in the United States*, Bulletin of the Department of Labor, No. 37, pp. 1023, 1088 (Nov. 1901); Burton J. Hendrick, *The Superannuated Man, Labor Pensions, and the Carnegie Foundation*, McClure's Magazine, Vol. 32 (Dec. 1908), pp. 115–123; U. S. Commissioner of Labor Chas. P. Neill, *Pension Funds for Municipal Employees and Railroad Pension Systems in the United States*, Senate Doc. No. 427, 61st Cong., 2d Sess. (1910); Editorial, *Why Pay Pensions?* Railway Age, Vol. 84 (April 21, 1928), p. 902; J. C. Clark, *Railroad Employees' Pension Plans*, Railway Age, Vol. 80 (April 17, 1926), p. 1063; Pennsylvania Old Age Pension Commission, *The Problem of Old Age Pensions in Industry* (1926), pp. 27, 102, 104; Ingalls Kimball, *Accruing Pensions as a Part of Current Operating Cost*, The Journal of Accountancy (Sept. 1929), pp. 161, 163; Mary Conyngton (U. S. Bureau of Labor Statistics), *Industrial Pensions for Old Age and Disability*, in Old-Age and Disability Pensions (Extracts from Monthly Labor Review), Senate Doc. No. 140, 70th Cong., 1st Sess., 1927–1928, pp. 99, 128.

is to remain in the industry he will probably prefer to remain with the same employer in order to safeguard his seniority rights. Furthermore, it is proper for Congress to consider the effect only of inducing continuity of service in the industry, since Congress is primarily concerned with the industry as a whole.

On the basis of a misinterpretation of section 2 (a) of the Act, and an incomplete view of the Act's operation and effect, respondents urge the Court to override the express statement of legislative purpose and condemn the Act as in reality related "only to broader and unauthorized social purposes." They rely on *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20. In both cases the Court found that the regulation (or tax) was a pretext and a disguise for a regulation of industries not subject to Congressional power. Those cases would be authority here if the Congress had attempted, through the railroads, to impose a retirement system on industries engaged solely in intrastate commerce. But such is not the instant case. Here there is no indirection or pretext. The regulation does not reach beyond the railroad industry. The Act is not to be condemned merely because it will also have desirable social results.

II

POWER OF CONGRESS TO INCLUDE ALL EMPLOYEES

Respondents assert (Brief, p. 48) that the Act is in excess of Congressional power because it is made applicable to all of respondents' employees. Respondents rely solely upon *The Employers' Liability Cases*, 207 U. S. 463, and assert (Brief, p. 62) that petitioners are asking that the Court overrule that case and hold that the mere fact of employment by an interstate carrier is sufficient to give Congress power to regulate the employment relationship even though the employment "has no connection whatever with interstate commerce."

Such is not petitioners' position. The only principle for which petitioners contend is that conceded by respondents (Brief, pp. 52–53) and well established by decisions of this Court, namely, that in regulation of interstate commerce Congress may include such closely related incidents as effective regulation requires even though, isolatedly considered, they might be deemed to be in intrastate commerce. *The Employers' Liability Cases*, consistently with that principle, held only that there was no such close relationship between interstate commerce and a rule of liability of carriers for injuries to employees not engaged therein as to require inclusion of the latter in order to make the regulation effective in interstate commerce. The Railway Labor Act, on the other hand, is an instance in which treatment of a problem on an in-

dustry-wide basis, i. e. application to all employees, was necessary to an effective solution of the problem in interstate commerce. (See Respondents' Brief, p. 61.)

In the main brief for petitioners (p. 93, *et seq.*) it has been shown that a sound, adequate, and effective retirement system in interstate transportation can be established only by treating the industry as a whole. Here, as in *Transit Commission* v. *United States*, 289 U. S. 121, 127, "multiple control" would be "detrimental to the public interest as well as to the carriers. Dominant federal action [is] imperatively called for."

III

PRIOR SERVICE

Respondents contend that the Act is invalid because in the computation of annuities, service rendered prior to its enactment, as well as service rendered thereafter, is counted. They attempt to support this contention by urging that the cost of paying annuities "may not be laid on the past" and that "the power to regulate interstate commerce * * * cannot include a *post mortem* regulation of past commerce" (Brief, p. 68). But this has no relevance to the Retirement Act. The Act obviously places no burden upon the past. The cost of the retirement system set up by the Act must be met by *present* and *future* contributions to to the railroad retirement fund and these are based

on present and future pay rolls, which reflect present and future operations. Just as plainly, the Act does not purport to regulate "past commerce." Its regulation has to do solely with the present and the future and its object is solely present and future benefits.

Respondents urge that because of the inclusion of service rendered prior to the enactment of the Act they will be made to pay large additional sums of money. Petitioners' main brief discloses the fallacy of this contention. Respondents are required to contribute not *for* prior service, but to meet the cost of securing present and future benefits from a sound retirement and annuity system.[2] The computation of annuities on the basis of service periods results in the payment of small pensions to employees with short service periods and reduces the cost that would be incurred if adequate minimum pensions were required to be paid to *all* employees. But the service basis is generally

[2] That the costs of annuities attributable to prior service must be borne by the employer was recognized in connection with the Federal civil service retirement system. In a report of a committee of the House of Representatives it was pointed out that since persons who retire shortly after the taking effect of the retirement plan will have contributed during but a small fraction of their time in service, "the Government in their cases must pay not only its normal share of the annuities, but the deficiency occasioned by the lack of full contributions throughout the periods of service upon which the annuities are based. This initial deficiency cost is unavoidable in the inauguration of a retirement system." House Report No. 394, 68th Cong., 1st Sess., p. 2.)

adopted because it differentiates fairly between employees and is at the same time fair to the employer. Respondents would retain the service period feature, but would exclude from it prior service. Such a method, involving, as it would, compulsory retirement without any annuity for large numbers who would be required to retire in the immediate future, would not only postpone for a generation the full effectiveness of a retirement system, but might, in the meantime, affirmatively disrupt labor relations in the industry and endanger the continuity of interstate transportation. For reasons of this kind, employers on the voluntary institution of retirement and pension plans have included prior service (R. 185).

IV

POOLING

Respondents assert (Brief, p. 76) that the Act is invalid "in that it unlawfully undertakes to mingle and pool the resources and obligations of the carriers." However, this objection is settled by the decisions of this Court in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, and *Noble State Bank* v. *Haskell*, 219 U. S. 104. Respondents attempt to distinguish those cases on the ground that there inequality of operation was purely conjectural whereas such inequality is proved in the present case (Respondents' Brief, pp. 81–83). No such distinction exists. In both of the cited cases,

the Court's decision proceeded on the express premise that each individual participant in the pool was subjected to the risk of contributing a greater amount to the fund than the liabilities accruing to the fund as a result of that participant's operation.[3] Respondents under the Act are subjected to the same chances. But that is all. Their so-called proof of inequality is confined to a showing that on or about September 15, 1934 some carriers had employees aged 70 or over while others did not—a fact which does not show equality or inequality in the operation of the Act.

Even if it were assumed that age of employees is the controlling measure of annuity costs, inequality in distribution of employees of 70 and over at a particular time could give rise to no inference as to inequality of operation. There is no evidence as to distribution of employees aged 69, 68, 67, 66, and 65, all of whom must retire under the Act in the absence of extension by agreement. For all that

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[3] *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 236–237: "But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors."

Noble State Bank v. *Haskell*, 219 U. S. 104, 10: "• • • still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business."

appears the distribution of those over 70 may even now be completely reversed through birthdays since respondents' figures were compiled; or the carriers having 70-year-old men may actually retire fewer employees this year than those not having them.

But the essential fallacy in respondents' argument is disclosed (Brief, p. 77) in the statement: "Age of employees to a controlling degree will measure mathematically the burden which the Act creates in respect of the employees of any individual employer." In this assertion respondents are in error. The burden in respect of the employees of any individual employer depends largely upon years of service (not age), average compensation, and length of life after retirement of such employees. That these factors are likely to cause inequalities among respondents is unproved and unknown.[4] If respondents had been aware of the relative unimportance of age they could not have attributed significance (Brief, p. 77) to the less than six-year maximum variation in the "most

[4] The age of particular employees may affect to some extent the burden imposed by the Act in respect of such employees, but only because of its bearing upon the probability of withdrawal or death before attaining retirement age. And before the burden imposed by the Act in respect of the employees of any carrier could be ascertained it would be necessary to consider, in addition to the factors already mentioned, age of employees to be taken into service, mortality rate in service, rate of withdrawal, permanent and total disability rate, retirement rate, rate of salary change, and rate of transfer between carriers.

probable" age of entry into the service as shown by the figures introduced by petitioners (R. 189).

V

THE SO-CALLED "UNCONSCIONABLE COST"

Respondents seek to have the Act declared invalid on the ground that its cost to the carriers will be unduly burdensome at the present time. If the Retirement Act is within the power of Congress under the commerce clause, the propriety of its passage at the present time is a question of Congressional wisdom or policy, provided that Congress did not act arbitrarily or capriciously. Congress did not act in disregard of the facts bearing upon the financial condition of the carriers. As indicated in petitioners' brief (pp. 148–149), not only were these facts matters of common knowledge, but they were specifically before Congress at the time of the enactment of the Emergency Transportation Act of 1933 whereunder Congress undertook to provide ways and means of improving the condition of the carriers, and at the time of passage of the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 5) wherein Congress provided for the lending of money to the railroads. That Congress took carrier conditions into consideration in drafting the Retirement Act is evidenced by a statement in the Senate Committee Report (Sen. Rep. 974, 72nd Cong., 2nd Sess., p. 4) that: "The substitute bill aims at this time and during the 4 years' experience period to impose the least possible burden on the railroads and the employees. It pro-

poses to meet current obligations, in the payment of annuities to employees who shall retire under those provisions, from current contributions during such experience period."

Though the depression may have greatly reduced the incomes of the carriers, it had also made serious inroads upon the economic security of railway employees. Investigation of the "earnings and standard of living" of a thousand typical railway employees during the depression, conducted under the supervision of the Department of Labor, the results of which are printed in the record (R. 219 *et seq.*) revealed that the depression has brought about for "veteran railway men" "a slow retreat from relative security toward destitution." The study showed that in 1932, two-thirds of such employees had received less than $1,500; three-eighths, less than $1,000; and one-tenth, less than $500 annual wages. The demoralizing effect of this upon the employees and the probable consequences thereof upon the efficiency of the transportation service were circumstances which Congress may well have considered. The concern of Congress over the effect upon the efficiency of the transportation service of existing labor relations and conditions is expressly shown in Section 13 of the Emergency Transportation Act of 1933, calling for a study of ways and means of improving such conditions and relations in the interest, as the Section provides, of "improving transportation conditions throughout the country."

The fact also appeared that the carriers were already expending in excess of $30,000,000 annually upon pension plans which were unsatisfactory to the employees and which Congress believed to be defective. (Petitioners' brief, p. 90.) Also Congress was aware that in other industries many millions of dollars were being expended annually as pension costs throughout the depression years. The industries paying these sums presumably did not regard the expenditures as a burden but rather as beneficial since they were making the payments voluntarily.

Furthermore, the extent of the burden imposed upon the carriers by the Retirement Act is exaggerated by them. Mr. Eastman stated (R. 161–162) that the Retirement Act will "not be so much of a burden upon the railroads as they would have the country believe." If the total costs of the Act seem large, this is only because it deals with one of the greatest industries, the annual wage bill of which alone is $1,500,000,000, as compared with the total cost of the Retirement Act to the carriers during the first year of $60,000,000. The latter sum is but 2% of the operating revenues of Class I carriers in the low year of 1932 ($3,161,934,711, Interstate Commerce Commission, *Statistics of Railways*, 1932, p. S–55). The total cost of the Act to the carriers attributable to prior service, so much emphasized by respondents, amounting to $2,943,966,000 (R. 209), payable, however, over a period of 80 years, is to be compared with the probable total

wage bill throughout the same period of $125,000,000,000 or more. A fairer comparative test of the burden, the amounts of individual annuities payable under the Act, reveals that the Act is not extravagant but that, on the contrary, the annuities are moderate—lower, as has been indicated (Petitioners' brief, p. 69), than annuities under industrial pension plans generally.

The assertions of the respondents with reference to the burden of the Act are, it is to be noted, based upon their own assumption that the necessary expenditures will be outlay only, without resultant benefit to themselves. But, as has been demonstrated, the whole theory of the Act is that it will be beneficial to the carriers through improvement of the efficiency of the personnel: as has been shown, actual pay-roll savings are likely to result and will to that extent reduce the gross outlay required by the Act. Respondents also ignore the very real possibility that over a period of time the expenditures required by the Retirement Act will be absorbed, in whole or in part, in the course of future wage negotiations; that the carriers will rely upon the costs of the Retirement Act in such negotiations may be assumed.

VI

COORDINATION

Respondents' brief omits any mention of the place of the Railroad Retirement Act in the general plan of rehabilitation of the railroads. Re-

spondents complain of what they call the "unconscionable cost" of the retirement system established by the Act, but they do not consider the economies which it makes possible.

Whatever other measures may be desirable, it is generally conceded that rehabilitation of the railroad industry requires the coordination of railroad activities. Such was the express finding of Congress in the Emergency Railroad Transportation Act, 1933, and its express purpose in establishing the office of Federal Coordinator of Transportation. Pursuant to the direction contained in that Act the Coordinator has instituted extensive studies of what coordination is possible and practicable to improve the efficiency and the adequacy of the national transportation system (R. 158–160; see also Report of the Federal Coordinator of Transportation, 1934, p. 6). The studies already made public disclose highly practicable opportunities for coordination which would result in vast savings and in increased railroad revenues. Thus the Coordinator's Section of Regional Coordination reports that economies of as much as $50,000,000 a year can be effected by coordination of terminal facilities alone, and that an additional saving of $23,350,000 per year in terminal expense would result from coordination of the movement and facilities in package freight (Report on Economy Possibilities of Regional Coordination Projects, Federal Coordinator of Transportation, pp. II, 2, 14–15). These econ-

omies are exclusive of other large savings which have not yet been definitely computed but which would result from the abandonment of unnecessary trackage in the case of parallel lines, and the coordination of back shops, general repair plants, and ticket offices (*Ibid*, pp. 19–24). The Coordinator's Section of Car Pooling reports that the elimination through coordination of "excess" empty car movement would result in operating savings of $75,000,000 per year, and that the savings in capital-carrying charges possible through coordination of operation and purchases is estimated at $25,000,000 more per year (Report on Freight Car Pooling with Plan for Proposed Box Car Pool, Federal Coordinator of Transportation, p. 3). The Merchandise Traffic Section reports that suggested coordination with respect to merchandise traffic can result in economies aggregating over $100,000,000 per year (Merchandise Traffic Report, Federal Coordinator of Transportation, pp. (1), 12–16).

It is very plain, however, and it was plain to the Congress when the Emergency Railroad Transportation Act was passed, that coordination of railroad activities would be largely at the expense of railroad labor.[3] Some plan to deal fairly with

[3] The Coordinator's study of terminal coordination at Kansas City disclosed savings through coordination of $2,081,699 per year. Of this amount 67% would be savings in labor costs (Report of Federal Coordinator of Transportation, 1934, p. 99).

railroad labor in this connection is essential for humane and practical reasons and to avoid aggravation of the serious problem of unemployment." This is manifest from the provisions of Section 7 (b) of the Emergency Railroad Transportation Act, 1933, providing that the "number of employees in the service of the carriers shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay roll of employees in service during the month of May 1933", with some provision for variation. The Retirement Act is essential if coordination is to be made practicable (R. 204–205; Report of Federal Coordinator of Transportation, 1934, p. 66).

"'A further material reduction in railroad employment under present conditions, coming on top of the severe reductions already made, would have deplorable results. In most instances the men displaced would not be able to find substitute employment. The mere discussion at the present time of railroad coordination and the possibilities of economy which it offers has terrified many railroad employees, and the fear has penetrated even further, for such projects would affect officers as well as men.

"The railroads, and the country, are therefore faced with a dilemma. Unless costs can be reduced and operation, equipment, and service improved, it will be difficult to arrest the retrograde movement and place the railroads in a position to thrive and grow. On the other hand, if men are displaced in large numbers at this juncture without protection, serious suffering will be caused and the morale of the service will be gravely impaired" (Report of Federal Coordinator of Transportation, 1934, p. 34).

These considerations bear upon the issues in this case in several ways. Viewed as an incident of the coordination of railroad activities, the Act is within the powers of Congress. From the standpoint of necessity for coordination it is also clear that the Act ought to apply to all railroad employees and not exclude employees in the very activities which are coordinated (Cf. *Texas* v. *United States*, 292 U. S. 522). And the alleged "unconscionable cost" of the retirement system disappears in view of the economies through coordination which it makes practicable (Petitioners' Brief, p. 151 *et seq.*).

VII

SEPARABILITY

Petitioners believe that the Act is valid in all its provisions. Respondents assume, however, that if this Court should hold any provision of the Act unconstitutional, the whole must fall. This assumption is wholly unwarranted.

Section 14 of the Act provides that "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby."

This section is clearly applicable, as the Court below held, to section 1 (b) of the Act defining the term "employee" so as to include employees in

actual service within one year prior to the enactment of the Act. Should this Court conclude that these employees cannot constitutionally be included, the words "who has been in such service within one year before the enactment hereof" can be deleted from section 1 (b) without affecting in any way the rest of the sentence or of the Act. And surely the Congress could not have intended the whole Act to hinge upon the inclusion of these comparatively few employees.

The separability section is equally applicable to inclusion of employees claimed by respondents not to be subject to Congressional control. This is true for the reason that the separability clause creates a presumption that Congress intended the Act to stand with respect to the four-fifths of respondents' employees, if it should be declared invalid with respect to the one-fifth. Furthermore, Congress did not adopt the Act in ignorance of the respondents' claim as to the effect of *The Employers' Liability Cases*. The claim was made by opponents of the legislation and answered by its proponents at the Congressional hearings. (See Hearings Before a Sub-Committee on Interstate Commerce on S. 3892 and S. 4646, 72nd Cong., 2nd Sess., pp. 23, 412–415, 420–421; Hearings on S. 3231, 73rd Cong., 2nd Sess., p. 132.) Congress determined that the inclusion of all employees was necessary and proper. But in anticipation of just

such an attack on the constitutionality of the Act as is here made, the Congress adopted Section 14 in terms peculiarly apt for the exclusion of such employees as this Court should hold, if it should so hold, are not subject to the commerce power. In similar manner, State workmen's compensation acts in terms applicable to *all* employees have been invalidated with respect to railroad employees injured while engaged in interstate commerce but upheld with respect to the remaining employees. (See, for example, *Arnbury* v. *Boston & Maine R. R.*, 276 Mass. 418, 420; 285 U. S. 234.)

Petitioners believe that, apart from other considerations, the practical difficulties of differentiating between railroad employees, for the purposes of a retirement system, on the basis of work in interstate and intrastate commerce are so great as to warrant Congressional action with respect to all employees. If, however, respondents are right in their contention (Brief, p. 62) that "under the proof in this case over 200,000 present employees of respondents (and all like employees in the future) are shown to be in classes where this assumed difficulty could not arise," then there is nothing to rebut the presumption of separability and the express declaration that if "the application" of the Act "to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby."

It is respectfully submitted that the decree below should be reversed and the cause ordered remanded to the trial court, with directions to dismiss the bill of complaint.

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MARCH 1935.

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DEC 11 1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 566.

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vs.

THE ALTON RAILROAD COMPANY, AND OTHERS, *Respondents*.

MEMORANDUM OF RESPONDENTS IN RE PETITION FOR WRIT OF CERTIORARI.

SYDNEY R. PRINCE,
ROBERT V. FLETCHER,
JACOB ARONSON,
EDWARD S. JOUETT,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondents, plaintiffs in the Supreme Court of the District and appellees in the Court of Appeals of the District, do not oppose the application of the petitioners for writ of certiorari. The issuance of the writ as prayed would result in the speedy and final determination of the important questions involved in this case.

We point out two inaccuracies in the petition for certiorari.

On page 3 the petition purports to quote the purposes of the Railroad Retirement Act as stated in Section 2 (a) of the Act itself There is omission in the quotation which might lead to misapprehension. Section 2 (a) provides (R. 16-17):

> "For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this act to perform and fulfill the obligations imposed thereby. This act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees."

It is said on page 5 of the petition, "The Supreme Court of the District of Columbia concluded that Congress has power to enact a statute 'providing for the compulsory retirement at a certain age of employees of railroads engaged in interstate commerce, together with provisions for the pensioning of employees so retired.'"

The trial court did not hold that. It held the statute before it unconstitutional for the reasons set out in the memorandum opinion (R. 261-265) and in its conclusions of law (R. 273-274). It simply refused to go further and utter a dictum as to whether Congress might have power to enact some other compulsory retirement and pension statute, saying (R. 262):

> "I am not prepared to say that the enactment of a statute providing for the compulsory retirement at a certain age of employees of railroads engaged in interstate commerce together with provisions for the pensioning of employees so retired is beyond the power of Congress under the interstate commerce clause of the Constitution."

In taking the position stated in the first paragraph of this memorandum it will be understood that these respon-

dents, although not opposing the petition for certiorari, assert that in their opinion the holding of the court below, that the Railroad Retirement Act is unconstitutional, was and is correct. And these respondents do not agree that the questions involved herein are so narrow as stated on page 2 of the petition. Broader grounds of unconstitutionality of the statute than those adopted by the trial court were advanced by the bill of complaint, were pressed upon the trial court (R. 274-279) and will, if the writ issues, be pressed upon this Court. It is clear from the authorities that in such situation the broader grounds to sustain the decree below will be properly before this Court. *Story Parchment Paper Co. v. Paterson*, 282 U. S. 555, 560; *Langnes v. Green*, 282 U. S. 531, 535; *United States v. American Railway Express Company*, 265 U. S. 425, 435.

Respectfully submitted,

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THE ALTON RAILROAD COMPANY AND OTHERS,
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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENTS.

SYDNEY R. PRINCE,
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March, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion below has not yet been reported, but it is set out in full in the transcript. (R. 261-265.)

JURISDICTION.

The final decree of the Supreme Court of the District of Columbia was filed October 30, 1934. (R. 279.) Defen-

dants in that Court, petitioners here, appealed to the Court of Appeals for the District of Columbia. (R. 280.) Before hearing or disposition there, petitioners, pursuant to Section 240 (a) of the Judicial Code (28 U. S. C. 347a), applied to this Court for a writ of certiorari. In view of the importance of an early determination by this Court, respondents interposed no opposition to the allowance of certiorari. On December 17, 1934, the petition for certiorari was granted. (R. 285.)

STATEMENT OF THE CASE.

This suit was instituted by 134 Class I railroads, the Pullman Company and the two Express Companies, against the Railroad Retirement Board and its individual members, to enjoin, on the ground of its unconstitutionality, enforcement of an Act of Congress, approved June 27, 1934, entitled "An Act to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes," therein designated the Railroad Retirement Act.*

The case came on to be heard upon the application of respondents for a temporary injunction. By agreement of the parties, respondents' affidavits in chief were served on petitioners in advance of the hearing with allowance of time for service of petitioners' answering affidavits and respondents' rebuttal affidavits. (R. 29.) Respondents interposed detailed objections to much of the matter contained in affidavits of petitioners. (R. 226-229.) Following the introduction of all the affidavits, it was stipulated that the hearing constitute the final hearing. (R. 261.) The decree below was in favor of respondents and enjoined enforcement of the Act on the ground of its unconstitutionality. (R. 279.)

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*For convenience all of the respondents sometimes will be be referred to as "railroads."

Railroad Retirement Act.

The Act is set forth as an appendix to this brief. It establishes a compulsory railroad retirement and pension system. It provides for the creation of a fund from which, under supervision of the Railroad Retirement Board, designated an independent agency in the executive branch of the Government, pensions shall be paid to railroad employees and to certain others. One-third of the fund is to be furnished by the present and future employees of the carriers in the form of payroll deductions and the remaining two-thirds by the carriers, each carrier being required to contribute twice the aggregate sum contributed by its employees. (Sec. 5.) The Government is to contribute nothing to the fund. From this fund payments, called annuities, are to be made to beneficiaries throughout the remainder of their lives.

The classes of beneficiaries eligible to annuities are: (1) all persons in the employ of any carrier on the date of enactment of the statute, June 27, 1934; (2) all persons who had been in the service of a carrier at any time within one year prior to enactment including those who had left such service prior to the date of enactment; and (3) all persons who subsequent to enactment shall enter service of any carrier, with preferential treatment for such as shall ever in the past have been in service of any carrier. (Sec. 1b.) In addition there are optional provisions relating to certain official representatives of railway labor organizations. (Sec. 7.)

The annuities are payable to any person in any of the foregoing classes in either of two contingencies: *First*, when he attains the age of 65, regardless of whether or not then in carrier service. (Sec. 3.) If he still is in carrier service at that age, he and his employer may agree upon his continuance in service from year to year after that age, but at all events he must retire at 70. (Sec. 4.) As to those occupying official positions, the compulsory retirement

provision is not applicable until five years after the effective date of the statute (Sec. 4); *Second*, at the option of the beneficiary, at any time between the ages of 51 and 65 if he shall have previously served 30 years in carrier employ. (Sec. 3.)

The amount of annuity is determined by multiplying the number of years of service, prior as well as subsequent to enactment, whether for a single carrier or a number of carriers, and whether continuous or not, by graduated percentages of the employee's monthly compensation. Broadly, the monthly annuity is at the rate of 2 per cent of the first $50 per month of average compensation multiplied by the number of years of carrier service not in excess of thirty, 1½ per cent of the next $100, and 1 per cent of any excess above $150, with the proviso that no compensation in excess of $300 per month shall be recognized for this purpose. (Sec. 3.) This schedule permits annuities as high as $120 per month. It is also provided, in the case of one with service period or periods aggregating 30 years who elects to take his pension before he is 65, that the annuities shall be reduced by one-fifteenth for each year that the employee is under 65 years of age at the time of the first annuity payment, except that, where the employee has been retired by the employer because of physical or mental disability, no such reduction shall be made in the amount of the annuity. Upon death of an employee, before or after retirement, his estate is to be paid all that he had contributed to the fund plus 3 per cent interest compounded annually, less any annuity payments received by him. (Sec. 3.)

The Government bears no part of the expense of the administration of the Act. Although characterized as "an independent agency in the executive branch of the Government," the Retirement Board is set up at the entire expense of the fund, and from it are to be paid all salaries and expenses of the members and employees of the Board,

including offices, equipment, furnishings, supplies, services and facilities: (Sec. 9.)

Questions Presented.

Respondents attack the constitutionality of the Act on the grounds that its real end is not the regulation of interstate commerce, but the accomplishment of social adjustments; that the Act has no reasonable relation to efficiency or safety in interstate transportation and hence is beyond the power of Congress; that it extends its provisions to all employees of respondents, including those not engaged in interstate commerce or in work so related thereto as to be within the regulatory power of Congress; and in various respects it violates the due process clause of the Fifth Amendment.

These questions are more fully stated in the summary of argument (p. 11).

The Facts.

In general, the evidence of respondents is unchallenged and the issues are essentially questions of law. Indeed, as stated in the opinion below, no serious issue of fact is raised by the answer (R. 261), and the principal function of the evidence was to produce the detailed and statistical elements supporting the general and ultimate facts pleaded in the bill. In the application of petitioners for writ of certiorari, this statement of the trial court is invoked, with the observation that there would seem to be "little necessity for obtaining the decision of an intermediate appellate court," and that while petitioners have assigned as error certain of the findings of fact made by the trial court "the errors so assigned primarily relate to conclusions of law embodied in the court's factual findings or to the inferences which it has drawn from non-conflicting affidavit testimony." (Petition for Certiorari, p. 7.)

We ask the Court to consider the findings of fact of the trial court (R. 265-273) in their detail and entirety. They

are fully supported by the evidence and furnish the factual basis upon which all issues in this case depend. The following is a condensed summary of the findings, omitting formal matters,

The number of employees varies from time to time. There are approximately one million railroad employees in service and subject to the Act. In addition there are something over one million ex-employees not now and not at the time the Act was passed or at any time within the year preceding its enactment employees of carriers, but who, in case of their re-employment, would become entitled to pensions based on past as well as future service. (R. 266, Findings 7 and 8.)

Over two hundred thousand, or nearly one-fifth of all carrier employees, are employees whose work and duties are not in interstate commerce or transportation but are exclusively confined to other phases of the businesses of respondents. (R. 266-7, Finding 9.) These will be more fully described in the argument. A substantial number of such employees have been exclusively engaged in intrastate suburban transportation services throughout the entire period of their railroad service. The Act applies to all these men. (R. 268, Finding 11.)

Some of the respondents carry on extensive coal-mining operations exclusively within particular states. In such employment there are 1,216 employees, receiving annually a total of over $1,300,000 in salaries and wages. The Act applies to these men. (R. 268, Finding 12.)

The respondents have many millions of dollars of properties and investments in no way devoted to railroad operation or used in the transportation service of the public. Substantial numbers of employees are exclusively engaged in handling such properties and investments of the respondents. The Act applies to them. (R. 268, Finding 13.)

The Act applies to 2,562 employees of railway associations, bureaus of information, bureaus of economics, tariff

bureaus and like bureaus and associations. (R. 268, Finding 14.)

Within one year prior to the approval of the Act more than 146,000 of respondents' employees, deaths excluded, left carrier service and have not returned. A large number of them are permanently separated from carrier service. Of these, not less than 8,065 were discharged for cause, not less than 21,158 voluntarily resigned or left service to engage in other employments, not less than 5,066 retired on account of age or disability, not less than 19,786 left service because they had been employed only for temporary work and the work was completed, not less than 5,512 left service because of consolidations of forces abolishing positions, and not less than 2,645 were seasonal laborers with whom the carriers lost all contact when the seasonal work was finished. The Act applies to all these men though they are not employees. (R. 269, Finding 17.)

At the initial rates fixed in the Act, 2 per cent employee contributions and 4 per cent carrier contributions, a total of approximately $90,000,000 will be paid into the fund the first year and, unless increased, the drain on the fund for payment of pensions will be so large and increasingly larger that the fund would be insolvent by the year 1942, showing an accumulated deficit by the end of that year of over $11,000,000. To keep the fund in operation it will be necessary for the Board to increase the percentages of contributions, as authorized by the Act, and thus the carrier contributions will necessarily have to be increased greatly above $60,000,000 a year. (R. 269-270, Finding 19.)

Respondents have no higher percentage of employees 65 years of age or over than other heavy industries in general. The percentage is less than for all persons gainfully employed in the United States. Based on an undisputed study of carrier employment, which covered 1,215,897 employees, 4.3 per cent were 65 or over, and 1.2 per cent were 70 or over. The 1930 census shows 4.52 per cent of all males and

females gainfully employed in the United States to be 65 or over and 5.09 per cent of the males. (R. 270, Finding 20.)

The number of employees between 51 and 65 with 30 years' service is not less than 100,000. (R. 270, Finding 21.)

Fifty-six respondents which have no 70 year men have 62.9 per cent of the employees and payrolls of all respondents. The other 81 respondents have all the 70 year men. The aggregate amounts of annuities which will be paid to men now 70 years old will be not less than $9,500,000 the first year and not less than $78,000,000 to termination of annuities. Of the two-thirds share required to be paid by the carriers, $3,983,666 the first year and $32,708,000 to the end of annuities will be contributed by the 56 respondents which themselves have no employees 70 years of age or over. (R. 270-271, Finding 24.)

In the ordinary course of railroad business a number of carriers cease operation each year. Since June 27, 1933, 25 went out of existence. The employees of all these nonexistent carriers share in the benefits of the Act at the expense of the remaining carriers who have never been their employers. One hundred and eighty-four short-line railroads went out of existence during the past 13 years. (R. 271, Finding 26.)

There are not less than 1,500 whole time officers or other official representatives of railway labor unions not employed by the carriers. Their average age is greater than the average age of employees of carriers, their service for carriers will be pooled with their service for labor unions as basis for annuities, their annuity benefit will be higher in relation to age and contributions than in the case of carrier employees, they have the right to elect to come under the Act, and they may constitute a substantial burden on the fund and thus on the carriers. (R. 271, Finding 27.) Such representatives as elect to come under the Act are required to pay employer and employee contributions.

The Act provides for pensions based on service performed prior to its enactment. Upon established actuarial principles, the gross amount of annuities thus based on such prior service, upon the assumption of retirement of employees at age 65, is $4,415,949,000. These pensions for service rendered in the past are payable during many years in the future. The present worth of two-thirds of said amount, using a 3 per cent interest factor, is $1,720,000,000. These figures do not include any part of the annuities related to service performed or to be performed subsequent to enactment. (R. 271-272, Finding 28.)

The railroads of the United States, including respondents, have suffered greatly by reason of the general business depression. There are now 42,750 miles of railroad in the hands of receivers or trustees in bankruptcy. Twenty-three railroads are represented by receivers or trustees in bankruptcy as respondents in this cause. More railroad mileage is now in receivership or bankruptcy courts than at any time in history, more even than in the depression of the early nineties. Fifty-five Class I railroads of the United States failed to earn operating expenses and taxes during the calendar year 1932, thirty-four during 1933, and thirty-three during the first six months of 1934. The net railway operating income of Class I carriers for the entire year 1934, based on the results for the first six months, and allowing for increases in labor costs and costs of materials and supplies, will be substantially less than for 1933. The railroad industry meets with keen competition from motor and water carriers and other competing agencies with respect to certain portions of its business. (R. 272, Finding 29.)

There was no emergency in the efficiency or safety of transportation or in the relations of railroads to labor to call for any emergency exercise of powers in enacting the Act, which indeed has no characteristics of emergency legislation. Railroads were, when the Act was enacted, and are now, operated efficiently and safely and more efficiently

and more safely than at any time in history. Railroads and railroad labor were at peace. A national agreement for the gradual restoration of the ten per cent voluntary wage reduction, which the employees had previously accepted because of the depression, had just been satisfactorily concluded between the railroads and their employees, with the active cooperation of the President of the United States and of the Coordinator. (R. 273, Finding 31.)

Railroads employing approximately 90 per cent of all railroad employees had already in effect voluntary retirement and pension systems, differing among themselves in details, but generally providing for retirement at about age 70, and all providing for pensions paid wholly by the carrier, with no contribution by employees, based upon continuous service with the paying carrier. These systems were established for two principal reasons, to encourage loyalty of employee to particular employer, and to encourage continuity of service with the particular employer, thus contributing indirectly to efficiency of the employee's work. The compulsory system set up in the Act would be destructive of these two elements of loyalty and continuity of service. (R. 273, Finding 32.)

The trial Court held the Act unconstitutional as in excess of the power of Congress under the commerce clause and as violative of the Fifth Amendment. (R. 261, 273.)

SUMMARY OF THE ARGUMENT.

I.

The first main division of the brief shows that the Act has no real, substantial or reasonable relation to efficiency or safety in interstate transportation and hence is beyond the power of Congress to enact.

Section 2(a) of the Act shows the emphasis it gives to social and non-commerce objects and the mandate of the last sentence of the section requires administration and construction in accordance with the real intents and purposes of the Act, to provide unemployment and old age relief. It shows the real intent is to achieve "the greatest possible use of resources" for those purposes, and that means "resources" of the railroads. The government furnishes none and the employees get all theirs back.

The decisions of this Court hold that the means adopted must be reasonably related to a legitimate end within delegated powers, that that relation is not sufficient if it be only remote or unsubstantial, and that whether this relation exists is a judicial question, not a question within unreviewable legislative discretion.

1. The Act is analyzed and it shows by the persons to whom it applies and the occasions and conditions upon which it operates that it is not in reality related to interstate transportation but only to broader and unauthorized social purposes. In last analysis only two theories are invoked in support of the Act in an attempt to relate it to the commerce power: (1) removal of "superannuated" employees and (2) creation of employee contentment.

2. The theory of elimination of superannuation fails as a basis of reasonable relation to efficiency and safety of interstate transportation and of constitutional power:

a. The evidence shows that in fact there is no excess superannuation among railroad employees.

b. Removal of older employees has no reasonable relation to *safety* in interstate transportation. Older men cause fewer accidents than younger men.

c. Removal from service on the arbitrary basis of mere age or service age, wholly disregarding fitness or unfitness, as this Act does, has no reasonable relation to either efficiency or safety.

d. Whatever relation removal of older men might have to either efficiency or safety would be wholly achieved by a retirement requirement alone and there is no justification for the distinct and added pension requirement, which is the requirement that takes respondents' property. The "humane" reasons invoked for pensions after retirement are no basis of constitutional power to take property of carriers and give it to their employees.

3. The "contentment theory" is wholly fanciful and gives the Act no real, reasonable or substantial relation to either efficiency or safety in interstate transportation. If that theory were indulged as source of power to take property, there would be no limit to the extent to which carrier property could be taken and given to employees for their contentment, and constitutional limitations and guaranties would be wiped out.

4. The wholly different voluntary pension plans of carriers furnish no support for the Act or for the argument that the Act has reasonable relation to efficiency or safety in transportation.

5. Since the legislative means adopted by the Act are demonstrated to have no reasonable relation to promoting efficiency and safety of interstate transportation, being related throughout solely to the unauthorized social objects of old age and unemployment relief for which carrier property cannot constitutionally be taken, under the authorities the Act is unconstitutional. It is not in reality a regu-

lation of commerce but is general social legislation not within powers delegated by the Constitution and the guise of the commerce power is a mere pretext.

II.

The second main division shows that the Act is unconstitutional because it extends its provisions to all employees of carriers, including those not engaged in interstate commerce, those engaged exclusively in intrastate commerce, and those not engaged in commerce at all. It thus violates the well settled rule of *The Employers' Liability Cases*, 207 U. S. 463.

III.

The third division of the brief shows that the Act is unconstitutional because it grants pensions for services rendered prior to its enactment. At the instant of the approval of the Act all past service of employees of all carriers for thirty years back was revitalized and became the basis of enormous bounties. The annuities for such prior service payable in 1935 alone amount to $68,749,000. They will steadily increase in succeeding years until 1953 when the portion of the aggregate of annuities payable in that year, based solely on service performed prior to the enactment of the Act, will amount to $137,435,000. On petitioners' own estimates, annuities to be paid employees for services performed prior to the enactment of the statute will aggregate $4,415,000,000, two-thirds of which is $2,943,000,000 and the present worth of this amount is $1,720,000,000. The authorities show that the Act, by reason of this prior service obligation, is unconstitutional, exceeds the power of Congress, and violates the Fifth Amendment.

IV.

The fourth division of the brief shows that the Act is unconstitutional in that it unlawfully undertakes to min-

gle and pool the resources and obligations of the carriers among themselves and with others. The Act treats all carriers together as one employer and all employees of all carriers as the employees of one employer. It bases the pensions upon the wages and length of service in all accumulated employment of each employee with any and all carriers. It pools the obligations and resources of each carrier with all others.

Upon fifty-six of the respondents who have no employees seventy years of age or over, the Act imposes a burden of $33,000,000 for pensions to seventy-year old employees of other carriers. The Act imposes the obligations of insolvent carriers upon those which are solvent and the obligations of abandoned carriers upon those which remain in existence.

V.

The fifth division of the brief demonstrates that the concept of "a national transportation system" written into the law by Transportation Act, 1920, and the decisions by this Court under that Act, are no support for the Retirement Act. None of the provisions of Transportation Act, 1920, undertakes, as does this Act, to make carriers partners in business or to destroy the separate corporate entity of the carriers or to take the property of one carrier and give it to another.

VI.

In the sixth division of the brief there are brought together in a group the various arbitrary, unreasonable, capricious and oppressive features of the Act which bring it into conflict with the due process clause of the Fifth Amendment.

(1) The Act violates the Fifth Amendment in requiring payment of pensions even to those who are not in railroad service at all. The various classes of those who are not employees of railroads but who come within the benefits of

the Act are pointed out. Their inclusion not only could have no reasonable relation to efficiency and safety in interstate transportation, but also violates the Fifth Amendment.

(2) Seven particular arbitrary features of the Act are analyzed.

(3) The Act is unreasonable and void because of the unconscionable cost imposed by it upon the railroads which are already in serious financial condition. The cost begins with $60,000,000 a year and increases year by year. In the tenth year it will aggregate $137,000,000. For prior service alone the cost will aggregate $2,943,966,000. This gives some idea of the still vaster sums which will be imposed on account of future service periods of present employees and of future employees. The Act threatens the credit and the continued existence of the railroads.

ARGUMENT.

I.

THE ACT HAS NO REASONABLE RELATION TO EFFICIENCY OR SAFETY IN INTERSTATE TRANSPORTATION AND HENCE IS BEYOND THE POWER OF CONGRESS TO ENACT.

Petitioners rely solely upon the power of Congress to regulate commerce, and the Act itself refers to no other power. Its profession of that power appears in the first sentence of Section 2 (a):

> "Sec. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this Act to perform and fulfill the obligations imposed thereby."

That sentence states four purposes, in the conjunctive, three of which emphasize social objects. The specific mandate of Congress governing not only the administration but also the construction of the Act is found in the remainder of the section:

> "This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees."

In that mandate there is nothing of interstate transportation, and nothing of retirement. Relief is the word.

The reference to "resources," the greatest possible use of which is to be made for unemployment and old age relief, is to the "resources" of the railroads. The Government furnishes none and the employees get back all their

contributions, in annuities or in return to their estates with 3 per cent compound interest.

This mandate does not run to the Board alone; it runs to the courts as well. It positively declares the essential and controlling intent and purpose of the Act and commands construction accordingly. It is to little effect that petitioners assert (Br. 80) that "it is obvious that the relief of unemployment is not one of the essential aims of the Retirement Act" when the mandate declares that it is. Congress did not empower petitioners to place the emphasis and to characterize as incidental that which Congress itself expressly made essential and paramount. Congress made its own emphasis.

The announced purpose of promotion of efficiency and safety in interstate transportation is within the commerce power if that purpose be genuine. It is not necessary to inquire whether the mandate if standing alone, would suffice to destroy the Act. The inherent characteristics of the Act itself, irrespective of that mandate and despite the profession in the first sentence of Section 2 (a), demonstrate its unconstitutionality. But the mandate lights the way to the discovery in the Act itself of those things which lay bare the pretext and disclose the real purpose. They establish its unconstitutionality.

For the Act to be constitutional, not only must its real end and aim be legitimate, that is, within the powers delegated to Congress by the Constitution, but the means adopted must have real and substantial relation to such legitimate end, must be reasonably adapted to the accomplishment of such end, and that relation is not sufficient if it is only remote or unsubstantial. *McCulloch v. Maryland*, 4 Wheat. 316, 423; *Mugler v. Kansas*, 123 U. S. 623; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228; *Keller v. United States*, 213 U. S. 138, 148-149; *Hammer v. Dagenhart*, 247 U. S. 251, 276; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20; *Linder v. United States*, 268 U. S. 5.

To assert that the means adopted by the Retirement Act are not reasonably and substantially related to the legitimate end of commerce regulation, is not to question the wisdom or motives of Congress, but raises a judicial question for the court. As between a variety of means, all reasonably related to a legitimate end within delegated powers, Congress has the choice and the courts will not review the wisdom or expediency of such choice. But the doctrine of unreviewable legislative wisdom or discretion extends no further than that. To make it cover the question whether the means adopted by Congress have real, substantial and reasonable relation to a legitimate end within its power, would make Congress supreme and wipe out all constitutional guaranties. Cases cited, *supra.*

We invoke the well settled doctrine, expressed by this Court in *Mugler v. Kansas,* 123 U. S. 623, 661,

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In cases such as this, where humanitarian and benevolent purposes are invoked in support of legislation, it is easy to forget that the means are not reasonably related to any legitimate delegated power and to overlook constitutional limitations. This Court has strongly warned against that tendency in *Bailey v. Drexel Furniture Co.,* 259 U. S. 20, 37, where it said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recog-

> nize or enforce seeming laws of Congress dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

And with like thought, particularly apposite to the present case, it was said in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416:

> "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. (Citing cases.) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In the light of these principles we shall examine the Act and the facts of record in this case to demonstrate that the Act has no real, substantial or reasonable relation to the legitimate end of regulation of commerce, the promotion of efficiency or safety in interstate transportation.

Relief of the aged, relief of unemployment, removal of fear of old age dependency, making possible greater employment opportunity and more rapid advancement of employees in service of carriers, as such, are clearly not ends within the commerce power. Congress has no power to take property of carriers to accomplish those ends as ends.

The legislative means adopted by the Retirement Act relate to those unauthorized purposes as ends. But do they have reasonable relation to the only legitimate end mentioned by the statute, "promoting efficiency and safety in interstate transportation"?

1 In Its Very Nature, Scope, Application and Provisions, the Act has no Real Relation to Promoting Efficiency and Safety in Interstate Transportation.

The Railroad Retirement Act is an attempted exercise by Congress of an asserted power without any precedent in this country and under our Constitution. It is the first attempt of government, federal or state, to force an industry, by compulsion of law, to establish a retirement and pension system for its employees, and to take the industry's property for annuities for the benefit of those no longer in the service of the industry.

We shall not follow petitioners in their discussion of what has been done in foreign countries under different forms of government. The question here is the validity of this Act under the Constitution of the United States.

The Act in its nature differs wholly from any previous regulation of railroads. It does not purport to lay down any rule to govern the conduct of commerce or transportation. It is not addressed to methods of operation, to instrumentalities of transportation, to hours or methods of work, to working conditions, or to anything related to the performance of interstate transportation. It runs at large, touching interstate transportation only incidentally and with much less intimacy than it does matters wholly foreign to it. This will appear clearly upon consideration of the persons to whom the Act extends, the situations in which it operates, and the proved conditions existing in the industry on which it would impose its burdens.

It promises pensions to more than 2,100,000 men, the promise being upon various conditions according to the case. To some it promises a pension immediately whether in service or not; to others, in service or after re-entry, upon attainment of age or completion of specified service, past and future service being combined. Of the 2,100,000, more than 1,300,000 have no connection with interstate transportation, and of these latter over 1,000,000 are not

even employed by the carriers. Thus the field in which the Act operates is not limited by interstate transportation but is a broader field, sufficiently broad to envision all these men.

The same is true of the occasions in which it operates. A youth of twenty enters railroad service, gets ten years' experience fitting him for and enabling him to get other employment that he prefers, then quits. For the next thirty-five years he engages in other business, and when he reaches 65 the railroads must pension him. Thus to accomplish the true object of the Act it looks beyond interstate transportation to the relief of financial or physical ills not referable to carrier service.

A girl of eighteen enters railroad service—and there are many thousands in railroad clerical service—works ten years, and then marries and leaves the service. With no further railroad service the railroads must pension her at 65.

The Act promises a pension even to employees dismissed for cause, thus rewarding them not for contributing to efficiency and safety but for established failure to contribute, which is inconsistent with and in contradiction of the theory of enhancement of efficiency and safety.

The Act gives to every employee the option to retire with pension at the end of thirty years' service, with specified reductions in the pension otherwise available at 65. It lays down no legislative rule as to whether retirement of such employees would benefit interstate transportation but leaves it to the employee himself to decide on personal grounds.

The purpose of the Act is broad enough to include railroad labor representatives, though railroad labor unions are in nowise engaged in interstate transportation.

The Act makes mere age the criterion for pension, ignoring fitness or unfitness of the employee.

That the Act itself shows its true object by its own disclosure of the field in which it operates will appear very

clearly as these and other features of like significance are developed in greater detail.

A fair analysis of petitioners' brief shows that in every phase of its argument it depends on the assertion of one or both of two theories in its effort to establish any relation to efficiency or safety. These are:

First, that the Act is reasonably calculated to accomplish a purpose of eliminating asserted excessive superannuation among railroad employees;

Second, that the knowledge and assurance of future pensions will have a present effect in ease of mind and removal of fear of old age dependency, thus creating a state of mental contentment of employees, which, it is asserted, will tend to contribute to the efficiency of their work.

2. The Theory of Elimination of Superannuation Fails as a Basis of Constitutional Power.

Petitioners present and rely on the theory that there exists in railroad employment an excessive amount of "superannuation" and that the removal of the "superannuates" will remove a drag on efficiency and perhaps contribute to safety—they are very guarded in their suggestion as to safety.

The facts as to asserted excess superannuation.

The trial court found (R. 270):

"20. The employees of plaintiffs have no peculiarity of age, physical or mental condition, or other characteristic distinguishing them from the members of society generally. Plaintiffs have no higher percentage of employees 65 years of age or over than other heavy industries in general. The percentage for plaintiffs is less than for industry in general and is less than the percentage for all persons gainfully employed in the United States. Based on an undisputed study of employment on 129 Class I carriers, made in 1932 and used and relied on by both plaintiffs and defendants,

which study covered 1,215,897 employees, 4.3 per cent were 65 or over, 95.7 per cent being under 65, and 1.2 per cent were 70 or over, 98.8 per cent being under 70. The 1930 census shows 4.52 per cent of all males and females gainfully employed in the United States to be 65 or over and 5.09 per cent of the males."

Petitioners undertake to dismiss that finding in a footnote (Br. 67) by asserting that it is definitely erroneous and directly contrary to all the evidence. Let us examine the evidence.

In the first place, the very use which the Act, the petitioners and their witnesses make of the word "superannuation" makes it meaningless as to any relationship to efficiency or safety. As it is used it means merely the state of being 65 years of age or over. To assume that a man, merely because he is 65, is necessarily incapable of continuing to perform safe or efficient work, whether he be executive, trainman, mechanic, clerk, accountant, traffic solicitor, janitor, stenographer, chemist, lawyer, custodian of records, or what not, ignores facts of common knowledge, belies universal experience, and is contrary to the uncontradicted evidence in this case and to the findings of the court. (R. 270, Findings 20 and 22).

Starting, however, with an unreal definition of "superannuation," petitioners assert, as basis for this unprecedented selection of one industry for imposition of a compulsory retirement and pension plan, that this industry is loaded down with an excessive amount of superannuation as compared with industry in general, and that to remove the "superannuates" will contribute to efficiency and safety.

The court's finding that there is no higher percentage of employees 65 or over in railroad service than in industry in general is abundantly supported by the evidence.

Respondents' Exhibit 4 (R. 60-61) of age statistics and graphic chart (R. 60a) reproduces a study of 129 Class I railroads made in the latter part of 1932. That study is the

most complete ever made of ages and service periods of railroad employees. Both petitioners and respondents accepted it as correct and relied on it in this case. It was furnished to the committees of Congress and to the proponents of the legislation, and its accuracy and reliability have never been questioned (R. 30-31). From it petitioners themselves derived the facts used as basis of several of their statistical and theoretical affidavits (R. 206-215).

Arithmetical computation based on that study (R. 61) discloses 4.3 per cent of employees 65 or over and 95.7 per cent under 65; 1.2 per cent 70 or over and 98.8 per cent under 70. These are the basic facts found by the court (R. 270) and they are not denied.

Petitioners have resort to mere expressions of opinion that there is "expessive superannuation," without factual support. However honestly entertained and expressed, opinions involving the age of a million and a quarter men scattered over the whole United States cannot possibly deserve respect if found in conflict with actual facts, produced in detail and not otherwise questioned.

The following opinion testimony of Mr. Eastman (R. 154-155) is illustrative:

> "Railroading is an old established industry. Its age alone brings about much superannuation among its employees. This natural tendency is enhanced by the employment rules in force on the railroads, especially the system of seniority, whereby the younger service men are the first to be laid off and the older service men the first to be promoted, and whereby the older service men have rights, when unemployed, to dislodge the younger service men. Because of these facts, the superannuation among railroad employees is *probably* much in excess of that existing in industry generally.
>
> This excessive superannuation is detrimental to railroad service in several ways."[1]

[1] Italics, when used for emphasis in quotations, are ours unless otherwise indicated.

This language at most is an argumentative conclusion of *probability*, which does not suffice to shake definite proof afforded by statistics so uniformly accepted. The "probability" being argued, the statement adopts the *non-sequitur* that what is thought probable must be true, and the language becomes

> "This excessive superannuation" (probability now treated as fact) "is detrimental to railroad service in several ways."

Mr. Latimer (R. 179) did go to the 1930 census figures, but he made no comparison of railroads with other industries in general or even with other heavy industries in general, and no comparison with all employment.

The 1930 census figures actually show (R. 133-136) 5.09 per cent of all males gainfully occupied, and a combined percentage of 4.52 of all males and females, to be 65 or over—substantially higher than the highest figure shown for railroads anywhere in the evidence. These facts the court found (R. 270).

The census table of ten general divisions and occupations (R. 135) shows for the total the percentage of 4.52 who are 65 or over, higher than 4.3 the highest figure for railroads, and of course higher still than 3.43, the census figure for railroads. Seven of the ten general divisions showed a percentage larger than the census figures for railroads.

Thus the very census figures relied upon by Mr. Latimer support the statement of Dr. Parmelee, respondents' witness:

> "Thus, it appears that superannuation (using the term as defined in defendants' affidavits to mean employees 65 years of age or over) in the railroad industry is not greater than, but is actually less than, that in industry generally." (R. 136).

At various points in the record and in petitioners' brief there appear intimations, wholly unsupported by proof,

that there is need for an influx of young blood in the railroad industry. The study of railroad personnel mentioned above discloses in railroad service over 22,000 of age 22 or younger, over 115,000 of 27 or younger, about 260,000 of 32 or younger, about 425,000 of 37 or younger, and more than 600,000 of 42 or younger. It is not disputed that the average age of all railroad employees is shown by that study to be about 43.

Petitioners (Br. 65) attempt to make a point that between 1930, the date reflected by the census report, and 1934, the time of the trial, there was an increase in the percentage of men 65 years or over in railroad service. There was no increase in the *number* of such men. The number of employees decreased substantially during that period and this decrease was accomplished in largest measure through the operation of labor union seniority rules which require the release of younger rather than older men from the service. (R. 239.) No reasonable point can be made of a reduction due to acute depression which does not indicate the condition of the industry during the period for which this Act is to obtain—all time to come. Moreover it is not disputed that safety actually increased because of the quality of the men who remained in service. It is not to be believed that the men who remained were conducive to safety but not to efficiency.

Aside from statistical evidence, there was overwhelming practical evidence of those who know the facts from a lifetime of experience in railroad work fully supporting the court's finding that the percentage of employees 65 years and over is less in railroads than in industry in general and proving that in fact the railroads are not burdened with men too old to be thoroughly competent to fill their jobs efficiently. (*Hartman*, R. 233-235; *Gray*, R. 237; *Willard*, R. 237-239; *Holden*, R. 240.)

The railroads carefully police their personnel to eliminate the unfit. This policing is fitted to individual cases and to actual facts as to ability or disability. It is reasonably

adapted to accomplish the elimination of "superannuation" in the true sense of unfitness to work efficiently and safely. (R. 233-235, 239, 251.)

In this connection petitioners inadvertently, refer (Br. 15) to the affidavit of Dr. William L. Hartman, Medical Director of the New York Central Lines as an affidavit "relative to the practice of that railroad to make periodical physical examinations of its employees." That affidavit shows clearly its application to the railroads generally. It does not lend itself to quotation without burdening this brief. We call special attention to it (R. 233) on account of its explanation of physical examinations on railroads.

Removal of older employees has no reasonable relation to safety.

No real effort is made in petitioners' brief or in their evidence to support the Act as a safety measure. Mr. Latimer, Chairman of the Retirement Board, witness for petitioners and vouched for by their brief (p. 42) as "probably the outstanding authority in this field," declared, in the very book from which petitioners quote so extensively, that older men cause fewer accidents than do younger ones. He said, referring to railroads, *Latimer, Industrial Pension Systems*, Vol. II, p. 724:

> "Experience seems to have proved, moreover, that older workers cause fewer accidents than do younger; hence there is little necessity for removing them on that ground."

The evidence in the record is conclusive that this is true. Railroad officers of the broadest experience, gained from a lifetime of railroad work, testify that older men actually do safer work and cause fewer accidents than do younger men. (*Gray*, R. 237; *Willard*, R. 239; *Holden*, R. 240; *Donnelly*, R. 243; *Elliott*, R. 251; *Loree*, R. 256; *Warfel*, R. 150.)

George H. Warfel (R. 150), Vice-President of the National Safety Council, and General Chairman of the Steam Railroad Section of that body, testified:

> "It is significant that pronounced force reductions, as indicated by annual man-hours, are accompanied by pronounced decreases in annual accident and casualty rates. There have been very few new or inexperienced employes taken into railroad service since 1929. The work has been carried on almost exclusively by the older, more experienced, and more thoroughly trained men. The low accident and casualty rates since 1929 clearly indicate that safety of railroad operation is best assured by retaining the older and more experienced men as long as they are able to render full, active service, and by avoiding, so far as possible, the necessity for inducting large numbers of young, and inexperienced men into service." (R. 152-153).

There was no attempt to controvert this testimony. The court found (R. 273, Finding 31) that railroads are now being operated much more safely than at any time in history. The evidence (R. 150-153) gives the details of a most remarkable accomplishment in safety in the past decade. There has been no reduction but an astonishing increase in the safety of operation of American railroads. In the ten year period 1923 to 1932 train accidents have been reduced 69 per cent, frequency in casualties to employees 76 per cent, and frequency in casualties to train employees 61 per cent. Passenger fatalities have been reduced 77 per cent since 1905.

In view of the reiterated insistence by petitioners and their witnesses that the average age of railroad employees has increased and the relative number of older men has increased during recent years, while this astonishing record of improved safety has been written, they could not seriously assert that the removal of the older men has any reasonable relation to promoting *safety* of interstate transportation.

So it is not surprising that their brief abandons any attempt to support the Act as reasonably related to safety. The word "safety" is merely mentioned in connection with "efficiency" in two places on page 20 of their brief. There is a general reference to "safety" on page 40. The subdivision of the brief headed "*Safety in interstate transportation*" (p. 72) consists of two short paragraphs. The whole discussion of safety is the following:

> "and in an industry having as many hazardous occupations as the railway industry; *improvement in personnel conditions is likely to mean increased safety.*
>
> "The increased efficiency and safety brought about by the Act and the improvement in labor conditions and relations will necessarily lead to improved carrier service and make for a more adequate national transportation system."

This is not an assertion that removing older men from service will promote safety. "Improvement in personnel conditions," as petitioners use the phrase, means general contentment.

So the guise of an Act to promote *safety* in interstate transportation goes out of the case. Nothing is left to connote the commerce power except the word "efficiency."

Removal from service on the arbitrary basis of mere age or service age has no reasonable relation to either efficiency or safety.

It is only such disability of age as produces unfitness to continue efficient or safe work that could constitute such "superannuation" as in the nature of things could have any reasonable relation to efficiency or safety in transportation. The removal of a perfectly competent employee who reaches 65, yet who continues in perfect health and possession of his faculties, able, experienced, efficient, might have some relation to the social purposes declared by this Act, the creating of employment opportunity and more

rapid advancement in service, the relief of unemployment. But it can have no real relation to promoting efficiency and safety. Its effect is the contrary. Yet this Act applies to all employees and its sole criteria for pension are age or service age.

An act prescribing periodical examinations to discover unfitness or disability, to be followed by compulsory retirement if either be found, might have real and substantial relationship to interstate transportation if confined to employees engaged in it. But insofar as the purpose of this Act is to eliminate men from service it is to eliminate both the fit and the unfit. From the nature of the case, that which disregards both ability and fitness could not be aimed at disability or unfitness. *Smith v. Texas*, 233 U. S. 630, 636, *et seq.*

Petitioners coin a new phrase of purpose, not used by the statute, much broader than the statutory phrase, and their brief devotes itself to the argument that the Act reasonably comes within a purpose to promote "*efficiency and economy.*" The statute says nothing about "economy." That word is used by petitioners as a broad blanket to cover the Act's attempt to regulate all the businesses of railroads and all their employment relations and even situations where there is no employment relation at all, an attempt which can have no reasonable relation to efficiency or safety in interstate transportation.

A typical illustration of the arguments made by petitioners under their broader word "economy" will be found on page 124 of their brief, where they say:

> "Furthermore, the evidence indicates that the 70-year-old men are to be found largely in the train and engine service in which the highest wages are paid (R. 32). The older employees also receive higher wages than the average (*Ibid.*). Consequently, it may be expected that in addition to the intangible benefits which may be expected to accrue to the carriers, substantial actual pay-roll savings will result through replacing

> the 70-year-old men with younger men at lower salaries."

This evidences a complete misunderstanding of the nature of railroad wages. The wages of practically all of railroad labor, and especially of that class referred to by petitioners—train and engine service—are fixed by contract schedule and the work done fixes the wage. The age of the man doing the work has nothing to do with it. If an old engineer is retired and a younger one takes his place the younger engineer gets exactly the same wages. The average wage of older employees is higher than that of younger employees only because the older employees have advanced to the higher paid work.

Since the Act requires compulsory retirement and pension on the basis of mere age, wholly disregarding fitness, and provides for optional retirement and pension on the basis of mere service period, wholly disregarding fitness and depending entirely on the desire of the employee born of such personal reasons as may appeal to him, it is inescapable that the Act does not have reasonable relation to efficiency or safety of interstate transportation. The real relation is to the social purposes expressed in Section 2 (a).

It is important to note that Section 2 (a), in referring to the purpose of providing for retirement of aged employees, does not refer to "retirement" as such, or as properly related to efficiency and safety. The language is interesting:

> "For the purpose of providing *adequately* for the *satisfactory* retirement of aged employees * * *"

"Adequately" and "satisfactory" cannot mean adequate and satisfactory to the promotion of safety or efficiency, since the Act itself recognizes no distinction based on fitness, efficiency, usefulness, or capacity. It recognizes only age or service age. It is clear that "adequately" means adequate to make possible greater employment opportuni-

ty and more rapid advancement, adequate to provide the greatest practicable relief from unemployment, adequate to provide old age relief. It is clear that "satisfactory" means satisfactory to the beneficiaries in the accomplishment of those social objectives. The very context of Section 2 (a), the nature of the provisions of the Act, and the whole argument of petitioners in its defense, demonstrate that the retirement requirement is related to the social purposes, not to regulation of transportation.

The truth of this is made manifest when we consider that the Act provides retirement annuities for ex-employees, for those becoming eligible years after they have ceased to be employees, for employees who are not engaged in and whose duties have no connection with transportation—all instances in which there could be no possible relation to efficiency or safety in transportation or to elimination of the unfit from transportation service, but in which there is obvious relation to the purposes of social relief.

This conclusion as to the arbitrary and unreasonable character of the Act as related to efficiency, in its disregard of fitness and its requirement of retirement on sole basis of age or service age, is borne out by the actual efficiency with which the business of the industry is carried on. As to this, the testimony of witness Gormley (R. 71-76) stands undisputed. He gives in great detail the record of railroad efficiency. The trial court found that the railroads were, when the Act was enacted, and are now, operated efficiently and safely and more efficiently and more safely than at any time in history. (R. 273, Finding 31.) Petitioners assign no error to that finding. Worn out men could not have accomplished this record of efficiency.

In any event, retirement alone would accomplish every possible purpose of eliminating the older men. The added pension requirement has no reasonable relation to that purpose or to efficiency or safety but relates only to the unauthorized social purposes.

But assuming for the argument that the requirement of compulsory retirement on attained age or attained service age has a real, direct and substantial relation to efficiency or safety in transportation, it is indisputable, if we face facts realistically rather than emotionally, that a retirement provision alone would accomplish the whole purpose. To add the requirement of paying pensions after retirement and until death of the employee has no relation to the purpose.

When the employee is retired he can no longer possibly affect efficiency or safety of transportation. His removal eliminates his alleged drag on efficiency and safety. But to pay him in addition a pension for his support for the rest of his life has no reasonable relation to efficiency or safety of transportation. Paying him a pension will help to relieve his needs in his retirement but that is not a purpose falling within the scope of the delegated power to regulate commerce.

Petitioners have only two answers to this clear lack of relation between pensions (as distinguished from retirement) and efficiency and safety in interstate transportation: *first*, social or humanitarian reasons why the retired employee should be supported; *second*, that a retirement requirement uncoupled with a pension provision would not give mental contentment to the employees while they are in service prior to retirement.

They assert "humane reasons" (Br. 17, 36, 40) why employees should not be retired without pension. To do so would be "unthinkable" they say (Br. 120). On page 91 they say:

> "This attempted separation of retirement and payment of annuities is unreal in any practical sense, since it would be impossible to require carriers to cast old workers aside without means of support."

Thus they confuse the question of what is socially desirable with the question of constitutional power. The question of power to impose pension payments on the carriers is distinct from the question of power to impose the retirement requirement. The question of the relation to efficiency and safety of pensions for ex-employees is distinct from the question of the relation to efficiency and safety of their severance from service.

The Constitution delegates to Congress no power to require carriers to pay pensions to ex-employees. This power is sought to be created out of a vacuum, on the theory that without the assumption of such non-existent power it would be inhumane and unthinkable for Congress to assert the power which it may have (if exercised in reasonable relation to efficiency and safety) to require retirement. This argument is a vicious circle. If it be indulged the Constitution would dissolve in good intentions.

Much sophistry is involved in the suggestion that work produces old age disability, in the reiterated solicitude for "men who have grown old in the service of carriers." That is verbiage to suggest what is not a fact. A man grows old whether in or out of service. When he "grows old in service" what has happened is that the carrier has compensated him for work done, while he was inevitably growing old.

The language of this Court in *Adkins v. Children's Hospital*, 261 U. S. 525, and there applied to wage scales of those in service, applies *a fortiori* and with indisputable force here to the pensions after retirement from service and after all work performed has been fully compensated. It was there said:

> "The moral requirement, implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it." (558)

Whatever may be the power of Congress to require railroads to retire older men in supposed promotion of efficiency and safety of interstate transportation, to superimpose the additional requirement that the carriers support the retired ex-employees, after the employment relation is terminated, is to do to a higher degree what this Court denounced in the *Adkins Case:*

> "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals." (558)

The only other justification offered in support of the pension requirement is the wholly fanciful and unsubstantial "contentment" theory, which we shall now consider.

3. The Theory that the Pension Requirement Contributes to Employee Contentment Gives the Act no Real or Reasonable Relation to the Legitimate End of Promoting Efficiency or Safety and it Fails as a Basis of Power.

The remarkable record of actual accomplishment in efficiency and safety which has been written by railroads and their employees in the past decade or more (R. 150-153, 273, Finding 31) to which we have already referred, and which properly arouses the pride of employers and employees, indisputably stamps this contentment theory as wholly fanciful.

There was no emergency in efficiency or safety of transportation or in the relations of railroads and labor to call for any emergency exercise of power, when this Act was passed, and it has no characteristic of emergency legislation. Railroads were operated more safely and efficiently than ever before in history. Railroads and railroad labor were at peace. A mutual agreement for gradual restoration of the voluntary ten per cent wage cut accepted by labor because of the depression had just been made with the cooperation and commendation of the executive branch of the government. No question of retirement and pension was in issue between them. The evidence of witness Thiehoff stands in the record undisputed:

> "And affiant further states that throughout the whole period of his employment in railroad service, from about 1883 to the present date, the question of pensions or retirement insurance has never been made the subject of an issue or of any threat of disruption of relations between the railroads and their employees, either nationally or regionally." (R. 232-233).

Under these circumstances the Act undertook to impose upon the railroads a stupendous pension obligation over and above their fully satisfied contract and legal obligations to employees. And in last analysis the sole attempt to relate this imposition to the commerce power, is by the fanciful theory that it will add to the contentment of rail-

road employees. The theory is fanciful on its face. If the contentment theory be a source of power there is literally no limit to the extent to which carrier property may be taken to contribute to employee contentment, and constitutional guaranties become a mockery.

Perhaps looking forward to a pension would tend to add to a man's contentment or ease of mind. So would the requirement that his employer furnish him a house to live in or educate his children. But certainly Congress would have no power to impose such obligations upon interstate carriers.

Petitioners vary the expressions "contentment," "mind at ease," "removal of the fear of old age dependency," although they are used throughout the brief, by using the word "morale" from time to time. What do they mean by "morale"?

They quote material from a number of authors and magazine writers, matter not in the record, not within any rule of judicial notice, matter which this Court refuses to use as a substitute for evidence and findings in passing upon constitutional questions in the light of the facts of a particular industry. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194.

Such are the following: An article in the *Annalist*, 1925, Vol. 26, p. 637, entitled *Edwards, Industrial Pension Plans Collapsing* (Br. 43, n. 11); a report of a committee of the Chamber of Commerce of the United States purporting to embody some sort of general study of *Employees' Retirement Annuities* (Br. 41, 44, 64, 133); a book written by petitioner Latimer, entitled *Industrial Pension Systems*, upon which petitioners place great reliance (Br. 38, 39, 42, 75, 76, 119) although its author was a principal witness for petitioners in this case and testified throughout 27 pages of the record with the utmost fullness on the history of industrial and railroad pensions, on matters of sociology, theory and opinion (R. 162-189); a study entitled *Elements of Industrial Pension Plans*, pub-

lished in 1931, by a corporation styled "National Industrial Conference Board, Inc.," not otherwise identified than as "closely associated with business organizations" (Br. 45, 46, 47, 70, 71).

But the very writers relied upon use "morale" in connection with voluntary industrial company pension systems as meaning the very thing sought to be attained by voluntary railroad plans, and the very thing which would be destroyed by the Retirement Act. The quotation from the report of the National Industrial Conference Board, Inc., appearing at page 46 of petitioners' brief is typical. It discusses the effect of voluntary pension plans on "plant morale" and explains the meaning of that expression:

> "More specifically, the efficiency of the individual workers is stimulated by the feeling of security and hopefulness that results when the individual is relieved of the fear of destitution and dependency in old age and *by the sentiment of loyalty and good will fostered by the pension plan*, which thus operates as a spur to the ambition of the worker and incites him to more intensive and sustained effort. Similarly the efficiency of the organization as a whole is increased by the *improvement of industrial relations, the development of a cooperative spirit, and the promotion of constancy and continuity of employment.*"

"Morale" so defined—a sentiment of *loyalty* and good will, fostered by voluntary pensions, spurring ambition, inciting intensive and sustained effort, improving industrial relations, developing cooperative spirit, and promoting *constancy and continuity of employment*—is exactly what the railroads aimed at when they established their voluntary systems, exactly what they have accomplished, and exactly what this Act would destroy.

The evidence is uniformly to the effect that the Retirement Act would destroy the vital elements of loyalty and of continuity of service which led to the establishment of railroad voluntary plans. (R. 236, 238, 240, 241, 243, 244,

247, 249, 251, 253, 254, 259 260). The court so found. (R. 273, Finding 32.)

Petitioners virtually so admit on brief. They say at page 20:

> "That the benefits which respondents expected to derive from their voluntary pension plans (said to be (1) greater continuity of service, and (2) improved employee loyalty) differ from those emphasized in the Retirement Act, does not affect the Act's validity, so long as it is calculated *in other ways* to promote efficiency and safety."

And further, after admitting that "it may well be" that voluntary plans are intended to promote efficiency and safety by inducing loyalty and continuity and that "it could also be true that these means were ignored in the Retirement Act," they say on pages 74 75:

> "Congress has deliberately chosen the means of providing old age security *for all railroad employees*, measured by years of service, *but not dependent upon continuity of service with any particular carrier*, as is required under the existing railway pension systems. If it were true, as claimed, that the Act will not encourage continuity of service and will remove the incentives for employee loyalty to employer, it has other virtues, as has been indicated; for example, it provides *greater assurance to employees of old age security* than has been the case under the carriers' pension plans, and *is likely to be productive of efficiency through improvement of employee morale.*"

Petitioners' argument is self-destructive. They quote from writers who use "morale" in the true sense of the spirit of loyalty arising from long, satisfactory and continuous service with, and appreciation of voluntary pensions granted by, a particular employer. They admit this Act would have no tendency to create that "morale." Yet they say it would have other virtues, including a likely tendency to promote "morale" in another sense—*and that sense*

is mere general contentment, ease of mind, freedom from fear of old age dependency. This is precisely that state of mind which would arise if the employee received the same promise from any other source, and probably not so pleasant a state of mind as would result if he should receive presently a far less sum of money through inheritance or fortunate investment, improving his immediate financial condition.

The issue here is the power of Congress. Constitutional power depends on the Constitution and not on the state of mind of particular groups of citizens.

On page 78 of their brief petitioners state:

> "Congress chose the more progressive method already tried in the laboratory of industrial experience and approved and recommended by those qualified to speak."

This is the *motif* that runs throughout their brief and it is wholly unwarranted. No such method as that embodied in the Retirement Act has ever been "tried in the laboratory of industrial experience."

Nothing that has ever been tried in the laboratory of industrial experience resembles this compulsory system, which in no way contributes to loyalty, cooperative spirit, or constancy and continuity of service.

In last analysis the sole basis of the effort to relate compulsory pensions in any way to efficiency or safety in transportation depends upon this fanciful theory of general ease of mind.

This brings us to petitioners' last application of their contentment theory, the suggestion that the Act by increasing opportunity for advancement of younger workers will add to their contentment of mind and lead to more zealous and efficient service. This is not different from the other applications which they seek to make of the general contentment theory and all that we have said of that theory applies here with equal force.

Railroad property is private property dedicated to public service, but the public service to which it is dedicated is transportation, and beyond that the regulatory power of Congress cannot extend. The creation of jobs for those in need of work and the creation of better jobs for those who have work are not a part of the public duty of railroads, and a statute requiring them to surrender their money for those purposes deprives them of their property without due process of law.

The contentment theory was urged by the government in *Wilson v. New*, 243 U. S. 332, as one excuse for the provision of the Adamson Law fixing wages. Mr. Justice Pitney did not agree with the majority that the Adamson Law was valid, and in his dissent he noticed this theory advanced by the government, and declared:

> "The suggestion that an increase in the wages of trainmen will increase their contentment, encourage prompt and efficient service, and thus facilitate the movement of commerce, is altogether fanciful. The increase effected is not at all conditioned upon contented or efficient service. It benefits alike those who are efficient and those who are not." (380)

The majority decision was one which the unanimous Court later stated "went to the border line." *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 544. The majority in *Wilson v. New* sustained the Adamson Law solely on the ground of national emergency. Evidently the majority agreed with the minority that the "contentment" theory was altogether too fanciful to support a taking of property or to relate such taking reasonably to the commerce power, for they completely ignored it.

The contentment theory is altogether without the guidance of reason. There is no standard for its measurement, no limit to its application if it be accepted, and no bounds to the conjecture which its acceptance would encourage and sanction. It can be of no avail to supply that essential relationship to interstate transportation which this Act fatally lacks.

4. The Wholly Different Voluntary Carriers' Pension Plans Furnish No Support to the Argument that the Act has Reasonable Relation to Efficiency or Safety.

Petitioners' reliance on the voluntary pension systems either as admission, precedent or estoppel involves a complete *non sequitur*. We have shown, and petitioners admit, that the voluntary systems have two prime characteristics for which industry voluntarily established them—their creation of loyalty and their encouragement of continuity in service. The fact of the establishment and continuance of such plans is no precedent for this compulsory system which lacks both these characteristics; and from the nature of the case that fact involves neither admission nor estoppel.

That the voluntary systems have resulted in increased loyalty is in effect the declaration of the writers whom petitioners quote and the evidence of railroad executives who administer them (R. 235-260, 273, Finding 32), and this is confirmed strongly by the efficiency with which railroad employees have done their work.

That there is remarkable continuity of service is demonstrated conclusively by the facts disclosed by the employment study to which we have referred (*supra*, 23), which shows that 17.78 per cent of the 894,142 employees 50 or younger had twenty years service with their present employer. The data is such that service with only present employer is shown. (R. 46, chart.) Of the 1,215,897 employees covered by the study 344,829, or 28.36 per cent, have such service of twenty years or more with the same employer, many of them very much more.

The question of constitutional power in this case is precisely the same as if no railroad had ever established a voluntary pension system. The merits or demerits of the voluntary plans are not pertinent to the issue of power. However, it is to be noted that having set up the voluntary establishment of railroad pension systems as the principal factual foundation of their argument, petitioners then at-

tempt to destroy that foundation by criticising every element characteristic of the voluntary systems. (R. 155, 169-180, 190-191, 195-197, 198-205, 221-222, 223-224.)

Analysis will disclose that in large measure petitioners' attack on the existing pension systems amounts to an assertion that they are improper insofar as they contain features conducive to loyalty or continuity of service, or to an assertion that they lack the social purposes which are the real objects of the Retirement Act. We shall not be drawn into debate as to the success of the voluntary plans, though petitioners' assertion (Br. 68) that they were threatened with a breakdown requires comment.

To support this assertion, petitioners refer to R. 180, where is found the claim that the voluntary systems were threatened with a breakdown on account of increasing costs; yet this Act would tremendously increase the burden on the railroads. One of the reasons why petitioners say the existing systems are defective is that the pensions paid are not large enough.

As a matter of fact, payments to individual pensioners under the voluntary systems have been well maintained, curtailment, according to petitioners' own proof (R. 180), being only 8 per cent in 1933, despite the depression, or, according to another of their witnesses (R. 200) "10 per cent, in general keeping with the so-called Chicago 10% Wage Reduction Agreement of 1932."

It is difficult to be patient with an argument that existing systems are facing a crisis because of mounting cost, that they do not pay large enough annuities, and that therefore a compulsory system which will greatly increase the cost is a rational solution.

The plan set up in the Act is the antithesis of the voluntary plans. It would in no wise contribute to loyalty of employee to employer. Gratitude would go to the Congress, not to the employer. It would encourage dissatisfaction by its suggestion that Congress is an inexhaustible fount of power to relieve any employee dissatisfaction. It would

definitely remove the inducement to continuity of service. It would reward the unfaithful, dishonest or careless employee equally with the faithful and careful.

Its reward of the unfaithful and inefficient is eloquent in demonstration that the Act has no reasonable relation to efficiency and safety, but that it is related to ends wholly different from the ends for which the voluntary plans were established. As is necessarily true in any large industry there are numbers of such unfaithful or inefficient employees discharged for cause every year. (R. 269, Finding 18.) Yet as to this feature, petitioners say (Br. 133-134):

> "Respondents object particularly (R. 8) that the provision of the Act in question does not differentiate between employees who have been discharged for cause and those whose separation from the service is due to other circumstances. *Having in mind the purpose of this provision to provide definite assurance of old age security, there is little, if any, more reason for providing for the loss of accrued pension rights in case of discharge for cause than in the case of discharge for any other reason.*"

Thus petitioners take refuge in a real purpose of the Act, "old age security," which, with other like purposes, they elsewhere in the brief disclaim as a real purpose and insist was "more in the nature of a hopeful characterization" of an incidental object than a real end of the Act. But the statement above quoted gives conclusive demonstration, not only that the nature and aim of this Act is wholly different from that of the voluntary plans, but also that the scheme of the Act has no real or substantial relation to a legitimate end of commerce regulation but is addressed to other social ends.

The voluntary pension plans are no precedent for the plan of this Act. The bald fact is that the compulsory plan of the Act has no precedent under our constitutional institutions. Petitioners admit its unprecedented character. They say, on page 35 of their brief:

> "As will appear, the Railroad Retirement Act, although it embodies the first compulsory retirement and pension plan enacted in this country, is but the development of voluntary plans which have been in use in this country, particularly among the railroads, for more than a third of a century."

Governments (federal, state and municipal) have voluntarily established pension plans for their own employees. In general they reward only the faithful and loyal and benefits depend upon continuity and length of service "varied from 10 to 40 years, 25 years being the commonest period and 30 the next in order." (*Public Service Retirement Systems*, U. S. Dept. of Labor, Bulletin of the Bureau of Labor Statistics, No. 477, pp. 5, 6, 12).

Private industrial employers have established voluntary plans of their own, using their own funds. Railroads are among them. But nowhere under our Constitution has there ever been a compulsory system imposed by government on an industry at the industry's expense. And the plan sought to be imposed by this Act is not the "development" of the voluntary plans. It is radically different from them in aim, intent, means and effect. It is a wholly new departure.

5. Since the Legislative Means Adopted by the Act Have no Reasonable Relation to Efficiency or Safety in Interstate Transportation, the Act is Unconstitutional.

The legislative means adopted by this Act are manifestly not reasonably related to efficiency or safety in interstate transportation or to any legitimate end within the commerce power of Congress. Hence it is inescapable that the real end or aim is something else not within the delegated power. That *something* is clearly disclosed on the face of the statute, relief, relief of unemployment, relief of old age dependency. And we come back to the significance of the mandate of Section 2 (a) showing the true intents and purposes to which the Act is required to be administered and construed.

Under the authorities which we cited at the outset of the argument, this Act cannot be valid under the Constitution.

As answer to our reliance on *Hammer v. Dagenhart*, 247 U. S. 251, and *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, petitioners content themselves with their own efforts to change the emphasis which Congress itself wrote, to characterize as incidental that which Congress made essential and paramount, and with the mere assertion (Br. 79):

> "It is clear from a mere examination of the Retirement Act that the retirement and pension system embodied therein was not adopted by Congress as a pretext for the accomplishment of unauthorized purposes."

We submit, just as it was clear in *Hammer v. Dagenhart* that Congress had used the pretext of the commerce power, and in *Bailey v. Drexel Furniture Company* that it had used the pretext of the tax power, to accomplish the unauthorized but real purpose of regulating the ages at which children might be employed, so is it clear that in this Act Congress is attempting to use the guise or pretext of the commerce power to accomplish unauthorized purposes —old age relief, unemployment relief, creation of greater employment opportunity and more rapid advancement of employees.

This Court looks through pretext to real intent, purpose and effect. Thus, in *Hammer v. Dagenhart*, it was said:

> "The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States." (271-272)
>
> "A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34. The control by Congress over interstate

commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *Pipe Line Cases*, 234 U. S. 548, 560." (275)

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority." (276)

There is no "magic" in a verbal reference to an object within a delegated power, when the real object of the legislation is plainly something not authorized. In *Bailey v. Drexel Furniture Company*, after carefully analyzing the provisions on the face of the Child Labor Tax Act to show that its real and manifest intent and purpose was not to levy a tax but to regulate child labor in mines and factories in the states, the court said:

"To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States." (38)

And further, passing upon whether the real intent was to levy a tax or to accomplish the other manifest purpose not related to powers delegated to Congress, it said:

"They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrong doing, and imposing its principal consequence on those who transgress its standard." (38)

Petitioners (Br. 79) cite *Stephenson v. Binford*, 287 U. S. 251, 272, in connection with their declaration that the purposes of rapid advancement of employees and relief of superannuated employees are not ends in and of themselves but only means to the legitimate end of promoting efficiency and safety in interstate transportation. And they cite (Br. 80) *Arizona v. California*, 283 U. S. 423, 456, *Smith v. Kansas City Title Co.*, 255 U. S. 180, 210 and *Hampton & Co. v. United States*, 276 U. S. 394, 412, in support of their declaration that the accomplishment of unemployment relief is not a real end of the Act but is only an incidental purpose.

The principles laid down by those cases are perfectly familiar but they have no application here. We have demonstrated that this Act has no reasonable relation to the legitimate end of promoting efficiency or safety in interstate transportation, that the declared purposes and intents of unemployment relief and of relief of old age dependency are not mere incidental purposes, not merely "hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable," but are the real and essential aims and ends of the Act, and that the legislative means written into the Act—wholly inconsistent with any legitimate end of commerce regulation—can be reasonably related only to those unauthorized ends.

II.

THE ACT IS UNCONSTITUTIONAL BECAUSE IT EXTENDS ITS PROVISIONS TO ALL EMPLOYEES OF CARRIERS.

The Act applies to "carriers" and declares that the term "carrier" includes "any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act." (Section 1a). Section 1 (b) of the Railroad Retirement Act provides that the term employee includes *each person in the service* of a carrier subject to the Act.

Petitioners recognize the breadth of the Act and take the

position (Br. 93) that "The Act is valid in its application to all employees of interstate carriers." Respondents contend that the inclusion of all employees makes the Act void. That is the issue here.

The court made the following finding:

> "9. Only a part of the businesses of the plaintiffs is interstate transportation. At all times a substantial proportion of the total number of employees of each plaintiff consists of employees whose work is exclusively confined to duties in connection with other phases of the business and having no connection with interstate transportation. Of all employees of plaintiffs receiving pay during the month of May, 1934, the last convenient month prior to the final hearing for which figures could be compiled, 211,107 employees, or nearly one fifth of the total, were employees whose work and duties were not in interstate commerce or transportation but were exclusively confined to other phases of the businesses of plaintiffs." (R. 266)

The court then set out the classes of employment in which those employees fell. (R. 267.) The record fully justifies the finding of the court.[1] Since it is undeniably true that there is and always will be a large and substantial number of such employees, many thousands, not connected with interstate transportation, and since petitioners' posi-

[1] For the assembly of this information respondents adapted as required by the circumstances, and followed, the method used in the *Arkansas Rate Case*, 230 U. S. 553, described and approved by the Circuit Court of Appeals in *Boyle v. St. Louis & S. F. R. Co.*, 222 Fed. 539, and approved by this Court in *Rowland et al. v. Boyle et al.*, 244 U. S. 106. All supporting affidavits were tendered to petitioners before trial, pursuant to agreement with them, and no objection was made by them either to the proof, the material on which it was based, or the method of its assembly. (R. 61). The employees making up the 211,107 not engaged in interstate transportation, and the duties of the several classes included, are shown in detail in the findings of the trial court (R. 267).

tion is that the application of the Act to *all* employees is valid, it will not help to a correct decision of the sharp issue above stated to discuss whether or not certain of the employees listed as not engaged in interstate transportation should or should not have been so listed.

Respondents' position is based upon the principle decided by this Court in *The Employers' Liability Cases*, 207 U. S. 463, which is conclusive of this question.

The Railroad Retirement Act applies to "*each person in the service* of a carrier", that is, to *all* employees. The first Employers' Liability Act had a similar application in that it provided that every carrier engaged in interstate commerce "shall be liable to *any of its employees*."

Both Acts apply to every kind of business in which a carrier may be engaged, and to all of its employees, regardless of their duties. The scope of the Employers' Liability Act was defined by the Court in that case as follows:

> "Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce." (497)
>
> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." (498)

To support the First Employers' Liability Act against attack on this ground the Government made a contention which the Supreme Court recited as follows:

> "It is the *carrier* and not its employes that the act seeks to regulate, and the carrier is subject to such

regulations because it is engaged in interstate commerce. * * * By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress and cannot be heard to complain of such regulations." (499) (Italics the Court's).

The Court rejected this contention of the Government and condemned the statute on this very ground, saying:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been and must continue to be, under their control so long as the Constitution endures." (502-503)

The principle announced in *The Employers' Liability Cases, supra,* and cases following it, has never been overruled and has been referred to in a number of decisions of this Court, some of them recent. In *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission,* 221 U. S. 612,

the Court had under consideration the Hours of Service Act. The provisions of that act apply to employees of railroads engaged in interstate transportation, but the term "employee" is limited by the terms of the act to "persons actually engaged in or connected with the movement of any train." The Court said:

> "The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 34 Stat. 232, which was before this court in the *Employers' Liability Cases*, 207 U. S. 463. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employe, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the *limiting words govern the employes as well as the carriers.*" (617-618)

In *Alaska Steamship Co. v. McHugh*, 268 U. S. 23, 27, the Court said:

> "The *Employers' Liability Cases*, 207 U. S. 463, held that 'conceding the power of Congress to regulate the relations of employer and employee engaged in interstate commerce, the [above-quoted] Act was unconstitutional in this, that in its provisions regulating interstate commerce, Congress exceeded its constitutional authority in undertaking to make employers responsible, not only to employees when engaged in interstate commerce, but to any of its employees, whether engaged in interstate commerce or in commerce wholly within a State.' *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S. 87, 93."

These decisions establish that the Retirement Act is void because its provisions apply to *all* employees of interstate carriers.

We do not overlook the rule that Congress may regulate intrastate commerce and matters that are not commerce at all, if there is involved such relation to interstate com-

merce or such commingling with it that effective regulation of interstate commerce requires the regulation of the intrastate commerce or non-commerce matters so commingled. The power of Congress in this respect was stated in *The Minnesota Rate Cases*, 230 U. S. 352, 399, and in *Hill v. Wallace*; 259 U. S. 44, 69.

Respondents in their evidence recognized that principle in grouping their employees. Wherever there was an overlapping or an intermingling or an employee was engaged in general work of both classes, such employees were not classed as without the regulatory power of Congress. (R. 46, 49-55, 57-59). And after excluding all concerning which there might be doubt there remained over 200,000 not subject to regulation.

Clearly there is no such relationship to interstate commerce, no such commingling of work as would require or permit Congress under the above principle to legislate concerning large numbers of employees whose work is not connected with interstate commerce or any commerce. Examples of these are those engaged in keeping corporate proceedings and records, those engaged in handling taxes, drafting and preparing contracts relating to lands, those engaged in experimentation, the secretaries and assistant secretaries of the corporations, the surgeons, the lawyers, the law clerks and claim agents, those engaged in industrial development and advertising, janitors and charwomen, messengers, elevator operators, porters, storekeepers, those engaged in forestry cultivation, protection of outlying lands, officers and employees of the various statistical and other railroad associations, those engaged in mining, those engaged in bookkeeping, or those engaged in construction as distinguished from maintenance work.

It is impossible to conceive how the granting of annuities to such employees could promote or protect interstate commerce. Congress is not charged with the duty of promoting or protecting intrastate commerce or other kinds of business which are not commerce at all.

Discussion of Petitioners' Position Contra.—Petitioners say, "The cases under the Federal Employers' Liability Act do not indicate the limit of Congressional power under the Commerce Clause." (Br. 97.) The reference is to the Second Employers' Liability Act and cases such as *Illinois Central Railroad Co. v. Behrens*, 233 U. S. 473, are cited.

We do not contend that Congress exhausted its power in the Second Employer's Liability Act with which the *Behrens Case* dealt. We contend that by the First Employer's Liability Act Congress attempted to regulate the liability of carriers to all employees, and it was exactly that which this Court held it could not constitutionally do. Congress in the Retirement Act has attempted to do exactly the same thing and, therefore, for the reasons given by this Court in *The Employer's Liability Cases*, the Retirement Act is void.

In the *Behrens Case* the Court was considering the applicability of the Second Employers' Liability Act to the case of a switchman whose work would be exclusively interstate transportation at one moment, exclusively intrastate transportation the next moment, and following that both intrastate and interstate transportation. While the Court held that under the Second Employers' Liability Act the test of liability was the employment of the switchman at the moment that he was injured, the Court said:

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries, suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly consid-

ered, was in interstate or intrastate commerce. (Citing cases). The decision in *Employers' Liability Cases*, 207 U. S. 463, is not to the contrary, for the act of June 11, 1906, c. 3073, 34 Stat. 232, there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employe, even though his employment had no connection whatever with interstate commerce." (477)

All that was said by the Court in the above quoted part of that opinion relied on by petitioners was that Congress might have gone one step further than it did in the Second Employers' Liability Act and might have made that Act apply to all of the directly intermingled work of that switchman; but the Court was careful to restate the holding of the first *Employers' Liability Cases* that a valid law could not be enacted to regulate the liability of carriers to all their employees, including those whose employment had no connection whatever with interstate commerce. Again we say that is just what the Retirement Act does.

That holding in the *Behrens Case* was nothing more than an assertion of the principle that where there was a commingling and intertwining of intrastate and interstate transportation, Congress could regulate such intrastate transportation as was necessary in order effectively to exercise its regulatory power over employees engaged in interstate transportation. Petitioners have not shown that any such necessity exists in this case. On this point they are content to say:

> "Respondents offered no evidence to show that, in fact, the inclusion of all employees is not reasonably related, or reasonably necessary, to the promotion of efficiency and safety in interstate transportation; or to show that the efficiency of only particular classes of employees and not others, affects the efficiency of the national transportation system." (Br. 96)

It is not necessary to prove a self-evident fact.

What the record discloses is the work and duties of the several classes of employees. If the witnesses had gone further and said that those employees were not reasonably necessary to the promotion of efficiency and safety in interstate transportation, that would have been a conclusion on a question of law. The witnesses stated that such employees *performed no work* connected with operation or transportation. (R. 62)

The proof in great detail identifies the 211,107 men in the employ of respondents who, as the respondents asserted and the lower court found, were not engaged in interstate transportation. In this connection decisions of this Court construing the Second Employers' Liability Act were relied upon by respondents as furnishing a convenient test, as to what employees may be classified as not engaged in interstate commerce or work so closely connected therewith as to be a part of it. Such a case is *Chicago & North Western Ry. Co. v. Bolle*, 284 U. S. 74, in which the Court said:

> "The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury was engaged in interstate commerce, within the meaning of the act, *naturally must be* whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it." (78-79)

To meet the detailed proof as to those not engaged in interstate transportation petitioners rely on the affidavit of witness Eddy, who undertook to show that the duties of certain of respondents' employees are so overlapping and interwoven as to be indistinguishable as between interstate commerce and other work.

He mentions machinists shifting from one form of work to another. (R. 194). The undisputed proof shows that no employees having such duties were included in the 211,107 men proved by respondents to be engaged in work wholly outside interstate commerce. Machinists with shifting du-

ties were expressly recognized by respondents as engaged in interstate commerce. (R. 267 sub 12)

As another illustration, he refers to employees engaged in maintenance of way. (R. 194) But no employees engaged in maintenance of way were included in the 211,107 men proved by respondents to be engaged in work outside interstate commerce. (R. 47)

As another illustration he mentions machinists, boilermakers, blacksmiths, sheet metal workers, and car men and declared them to be essential to the construction and maintenance of equipment used in interstate commerce. (R. 194)

If such men are engaged in maintenance or in mingled work of maintenance and construction, the proof treats them as in interstate commerce and they are not included among the 211,107 men not so engaged. (R. 267 sub 12) However, as to those whose work is confined to construction of equipment, this Court, in *Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238, said:

> "A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation." (247)

The *Manning Case* did not arise under the Employers' Liability Act but it states the applicable principle.

Finally Mr. Eddy declares:

> "It is inconceivable that any carrier could operate in interstate commerce without the services listed in items 1 to 16, inclusive, on pages 4 and 5 of the affidavit of Julius H. Parmelee herein above referred to." (R. 194)

This is met by the case of *New York, New Haven and Hartford Railroad* v. *Bezue*, 284 U. S. 415. That case was

brought under the second Federal Employers' Liability Act for an injury to an employee while in the employ of an interstate carrier, and the question was whether the employee's work could be characterized as being in interstate commerce within the statute. The state court had held that the terminal facilities in which the employee worked constituted a part of the railroad's system necessary to the operation of the road and to the conduct of interstate commerce. The Court said:

> "The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act. *Delaware, L. & W. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Chicago, B. & Q. R. Co.* v. *Harrington*, 241 U. S. 177; *Illinois Central R. Co.* v. *Cousins*, 241 U. S. 641; *New York Central R. Co.* v. *White*, 243 U. S. 188, 192; *Industrial Accident Comm.* v. *Davis*, 259 U. S. 182, 187; *Chicago & N. W. Ry. Co.* v. *Bolle*, ante, p. 74." (419-420)

Thus, broadly speaking, this Court had recourse to the general knowledge which it shares with all informed persons, of the very railroad practices, operation and personnel as to which respondents here procured the facts in detail and proved them by undisputed testimony.

Petitioners select for special discussion three classes of employees, viz. "(1) employees engaged in miscellaneous activities such as the handling of investment accounts, securities, rents, and the sale of electric power; (2) employees engaged in the intrastate suburban service of the carriers; (3) as to two of respondents, employees engaged in coal mining." (Br. 113).

The only criticism which petitioners offer as to the first class of such employees is the relative smallness of their number. We admit that the number of these is relatively small, but they are of substantial importance in themselves and they emphasize the Act's complete disregard of all distinction between interstate commerce and matters foreign to it. The proof as to the second class, employees engaged in intrastate suburban service, certainly shows that several respondents have a substantial number of employees who are exclusively so engaged. (R. 118-123. Finding No. 11, R. 268).

As to employees engaged in mining coal, this Court in *Delaware, etc., R. R. v. Yurkonis*, 238 U. S. 439, 444, 445, distinctly held that such employees are not engaged in interstate commerce. Oddly enough, petitioners cite *Norfolk & Western Ry. Co. v. U. S.*, 287 U. S. 134, in which this Court sustained an order of the Interstate Commerce Commission requiring, over the protest of the carrier, that it carry its coal mining properties in its accounts as property not used in the service of transportation.

Petitioners, in the course of their discussion of these three classes, suggest that "the separability clause (Section 14) may be applied to exclude them from the operation of the Act." (Br. 113). A reference to the well established rules as to separability will disclose that this suggestion is without merit.

The Future Trading Act of 1921, which was declared unconstitutional in *Hill v. Wallace*, 259 U. S. 44, contained a separability clause substantially identical with that of the Railroad Retirement Act. The Court said that clause

> "did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." (70)

From all the decisions only one conclusion can be drawn: the entire function and effect of a separability clause is to

create a presumption of divisibility which is overcome by considerations making it evident that the Act as it was adopted in fact is indivisible, or making it clearly probable that the legislature would not have been satisfied with what would remain if unconstitutional features be eliminated. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 184-185.

Notwithstanding this rule, petitioners ask the Court to reframe the Retirement Act, so as to exclude employees engaged in certain miscellaneous activities, employees engaged in intrastate suburban service, and employees engaged in coal mining. The suggestion is that the Court perform legislative work which it has definitely said is beyond its power and function. Surely no court could be expected to scan the employment lists of the railroads of the country, covering innumerable activities, select certain lines for exclusion from the effect of the statute, and add exceptions to the general language of Congress.

Petitioners say (Br. 99) "That respondents exaggerate the decision in *The Employers' Liability Cases* is apparent from the fact that Congress has since, on more than one occasion, enacted legislation applicable without differentiation to all railroad employees; and the statutes referred to have been sustained by this Court." To support this statement petitioners refer to *Southern Ry. Co. v. United States*, 222 U. S. 20; *Texas and Pacific Ry. Co. v. Rigsby*, 241 U. S. 33; and *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, 214, involving Acts relating to safety appliances on locomotives and cars, and *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, involving an Act regulating the hours of service of only such employees as are engaged in or connected with the movement of a train.

All these cases are but illustrations of the rule that Congress is not to be defeated in its power to regulate interstate commerce merely because there may be an intermingling of interstate and intrastate commerce making it necessary, for the effective exercise of that power, that it be ex-

tended to persons or things which otherwise would be beyond it.

Petitioners also refer to *Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548. The provision of Railway Labor Act upheld by the *Texas & New Orleans* decision had nothing to do with any right of any railroad but simply forbade a railroad to intrude upon rights of others, the intrusion forbidden being in a respect likely to cause labor disputes interfering with interstate commerce. The Court said:

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds." (571)

The decision recognized that the statute was a statute to prevent strikes. (565). That case, therefore, is but another application of the rule that the power of Congress to regulate commerce includes the power to protect it against anything which threatens it.

Moreover, the labor organization concerned included employees undeniably engaged in interstate commerce, as is indicated by its full name, "The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees." (554). The statement of facts in the decision does not indicate whether the employees concerned included intrastate employees. If so, the decision merely illustrates the rule that the power of Congress to regulate commerce will not be defeated merely because there is commingling of interstate commerce and intrastate commerce such that for effective exercise of the power it must

extend to things or persons otherwise beyond congressional reach.

Petitioners refer to what they term practical considerations. Argument is presented under that head as to the difficulties of keeping records and determining for what period of service a man was or was not engaged in interstate commerce. Under the proof in this case over 200,000 present employees of respondents (and all like employees in the future) are shown to be in classes where this assumed difficulty could not arise.

The Act is not even confined to employees. It goes further and extends its benefactions to a large number of persons who are not employees at all. Section 1(b) includes as "employees" every person "who has been in such service within one year before the enactment hereof." The undisputed evidence discloses and the trial court so found (R. 269) that there are 146,000 persons who left carrier service within the year next before the adoption of the Act, of whom approximately 80,000 will not return to service, 6,000 of them having been dismissed from the service for cause.

Again, the Act includes as employees 1500 representatives of railroad labor organizations (R. 271) and all those who shall succeed them in the future. They are not chosen, or employed by, or under the direction of any carrier.

On this branch of the case petitioners really ask this Court to overrule *The Employers' Liability Cases* and the long line of cases following them, and to hold (1) that one engaging in interstate commerce thereby submits all his business to the regulating power of Congress, and (2) that the mere fact of employment by an interstate carrier is sufficient to give Congress the power to regulate the relationship of such employee to the carrier, even though his employment has no connection whatever with interstate commerce. This cannot be done without doing violence to the Constitution.

III.

THE ACT IS UNCONSTITUTIONAL BECAUSE IT GRANTS PENSIONS FOR SERVICES RENDERED PRIOR TO ITS ENACTMENT.

Section 3 of the Act provides that the annuity shall be based on the beneficiary's "service period" which, as defined in Section 1 (f), is the number of years of service in the employ of one or more carriers, whether or not continuously performed. The annuity is computed by multiplying the number of years by graduated percentages of the average monthly compensation. The "service period" thus used as the basis of the annuity is not confined to service performed subsequent to enactment of the statute, but includes the whole period of carrier service in prior years, subject only to the limitation of the "service period" to 30 years. All persons coming within the statutory definition of "employee" are eligible to annuities. That definition includes "each person in the service of a carrier . . . who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service." (Section 1b).

The Act was approved June 27, 1934. At that time there were 1,164,707 employees in the service of the Class I rail carriers. (R. 33.) At the instant of such approval all service that had been performed by these employees during the past 30 years was revitalized, because these employees were then endowed with the statutory right to pensions for their services theretofore rendered and already paid for. True it is that their bounties are payable in the future and that payments do not commence until attainment of specified age (or completion of 30 years service) but the bounties are not otherwise contingent or defeasible. Not one day of service subsequent to enactment of the statute is required to vest the right to these bounties. Service subsequent to enactment accrues its own annuities.

Although the evidence of the respondents shows a much greater amount, it will suffice to refer to the affidavit of Mr.

Latimer, Chairman of the Railroad Retirement Board, presented by the petitioners which shows upon the assumption of the retirement at age 65 of such present employees alone who, on an expectancy basis, survive to 65, or have already attained that age, that the annuities to be paid to them *for services performed prior to enactment of the statute* will amount in the aggregate to four billion, four hundred fifteen million dollars, of which the two-thirds share to be paid by the carriers will amount to two billion, nine hundred forty-three million dollars. (R. 209). The same affidavit shows the present worth (3 per cent interest factor compounded annually) of this two-thirds share of the carriers to be one billion, seven hundred twenty million dollars. (R. 210).

The annuities for such prior service payable in 1935 alone amount to $68,749,000. The annuities in respect of prior service will steadily increase in succeeding years until 1953, when the portion of the aggregate of annuities payable in that one year, related only to service performed prior to enactment, will amount to $137,435,000. (R. 209). Under the terms of the statute, the carriers are required to bear two-thirds of this financial burden. (Sec. 5).

The court below found all the foregoing facts (R. 271, Finding 28) and to that finding the petitioners did not assign error. The finding accepts their own lower estimates of cost.

The amounts recited do not reflect the full financial obligation imposed by the Act on account of service performed prior to its enactment, because they do not include annuities for past service of the 146,000 persons who left the employ of the carriers within the year next preceding approval of the Act but who, nevertheless, are eligible to pensions for all their past service even though they never return to railroad employment. Furthermore, these figures take no account of the million or more persons who, in the past, had been in carrier employ

but have not been since June 27, 1933, yet who, upon re-employment for only a day, are rewarded with annuities for their prior service.

The distinction between pensions for past services and annuities related to future services is as fundamental in political and industrial economics as it will be found to be in law. This has been recognized by the proponents of pension legislation. The following statement is included merely to show that the distinction referred to is well recognized.

Senate Bill 3892, 72d Congress, proposed by the Railway Labor Brotherhoods, candidly segregated pensions for prior service from annuities for future service, and for the former provided a lower yearly rate. Counsel for the Railway Labor Brotherhoods, stated to the Senate Subcommittee:

> "In addition to this retirement insurance the bill also provides what are really pensions for employees now old in the service who would not be able to build up an adequate retirement annuity by contributions in their remaining years of service. To protect these veterans the bill provides for a 'prior-service pension fund,' created also by equal contributions from employer and employee; in fact, 1½ per cent each, based on the compensation being paid the employees. Thereby men now old in the service will receive not only the retirement insurance they helped to buy but also an additional pension which their fellow employees helped to provide for them so that they may live decently in old age.
>
> "It ought to be made clear at the same time that there is a great difference between the retirement insurance and the prior-service pension. In the one instance a man is paying his own contribution and the railroad is putting its contribution in equally. That is an essential and is part of what he gets out of his labor. It is part of his reward of labor, and he buys his own insurance just as though he bought it in the market. But if you are going to start a retirement-insurance plan you have either got to utterly ignore these men

now old in the service or provide pensions for those men. You have got to get money somewhere else than out of their contributions, because it has not been provided." (Hearings before a subcommittee of the Senate Committee on Interstate Commerce, on Pensions and Retirement for Employees of Interstate Railways, January 11 to January 19, 1933, p. 15).

In the hearing before the Senate subcommittee on the bill which, with modifications, became the statute now under review, the distinction was again recognized. The actuarial and pension expert of the Railway Labor Brotherhoods said:

"Starting now, that is rather easy to do, but in the past you can't collect from the freight and passenger payers of 30 years ago their share; you can't collect from the stockholders of railways then their share, and if, in addition to building up the necessary reserves resulting from service in the next 10 or 20 years, they must also make up the contributions for service in the past, that seems to be a difficult thing to do, and some recognition of that fact must be given." (Hearings before subcommittee of the Senate Committee on Interstate Commerce, on Retirement Pension System for Railroad Employees, April, 1934, pp. 70-71.)

A statute which requires the payment by the carriers of pensions for service already performed and heretofore compensated in full is not an exercise of the legislative function.

All legislation is essentially prospective. It is historically defined as "a rule of action." Its province is to deal with the future. It may not regulate transactions of the past. This fundamental function and character of the legislative power under our system has, from the beginning, been recognized and repeatedly declared.

"A legislature cannot declare what the law was, but what it shall be." *Ogden v. Blackledge*, 2 Cranch 271 (syl).

> "'The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future.'" *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 503.
>
> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226.

Petitioners contend that the warrant for the grant of annuities for past services is to be found in the increased efficiency with which railroad employees will henceforth perform their work. They say (Br. 118):

> "It has been shown that the pension is not at all an additional payment for past services 'long since completed and fully paid for', but is an expenditure for a present and future benefit through improvement of the personnel of the carriers."

The statute itself destroys that argument. Under the terms of the Act, not one day's future service is a requisite for the accrual of billions of dollars of pension rights in the case of those in the employ of the carriers on the day of enactment and in the case of those who had been in such employ within a year prior thereto. That the requirement to pay these billions of dollars of bounties for past service has no reasonable relation to improved future efficiency of railroad employees, is shown by the fact that it is not even conditioned on any future continuance in service. Future service accrues its own additional annuities.

To decree, for the first time in the year 1934, a previously unpromised bounty for services rendered in the indefinite past, is something other than an exercise of the power to regulate future interstate commerce. Undeniably, such a decree is utterly impotent as regulation of commerce that

is past. The Act in this respect can serve only to create new rights and new obligations in respect of past services, altogether unanticipated during the years when the past service was performed and springing into life for the first time, to the surprise equally of employer and employee, when the prior service had become history.

If we should assume full acceptance of the petitioners' theory with reference to increased efficiency envisioned for the future, it still remains that the financial burden of realization may not be laid on the past. Regardless of what else may be comprehended in the power to regulate interstate commerce, on first principles it cannot include a *post mortem* regulation of past commerce.

In *Forbes Boat Line v. Commissioners*, 258 U. S. 338, there was involved the constitutionality of a statute purporting to validate tolls that had been collected unlawfully in the past for the passage of ships through a canal lock. In holding the statute unconstitutional, the Court said:

> "To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot." (340).

Just as the ships passed through the canal, relying upon existing legal rights, so did the carriers and their employees pass through the years prior to 1934, relying upon existing legal rights.

Plenary as is the congressional power to regulate interstate commerce, it may only be exercised within constitutional limitations, notably those contained in the Fifth Amendment. *Gibbons v. Ogden*, 9 Wheaton 1, 196, 197; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336; *Lottery Case*, 188 U. S. 321, 362-3; *United States v. Chicago, M. St. P. & P. Ry. Co.*, 282 U. S. 311, 327. Although the Court has refrained from declaring an all-inclusive descrip-

tion of those legislative acts that are violative of the due process clause (*Green v. Frazier*, 253 U. S. 233, 238), it has frequently announced the basic tests. Thus in *Holden v. Hardy*, 169 U. S. 366, 390:

> "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation;"

And in *Chicago & N. W. Ry. Co. v. Nye, etc., Co.*, 260 U. S. 35, 44:

> "But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and 'violate the rudiments of fair play' insisted on in the Fourteenth Amendment, will be held to infringe it."

The infirmity of the Act, in providing pensions for services rendered prior to enactment, presents for petitioners a dilemma which they cannot escape. In their answer they expressly deny "that such prior services were at the time of the approval of the Act closed or completed transactions." (R. 28.) Not a syllable is to be found anywhere in their affidavits even suggesting, much less establishing, any factual basis for this denial. To the finding of the court below that "Such prior employments and services are, and at the time of the approval of the Act were, closed and completed transactions" (R. 271), the petitioners did not take exception or assign error (R. 280-281).

In the same subdivision of the answer is found the allegation "that the prior service is only a measure of the amounts of the annuities provided by the Act and that it is a convenient, reasonable and necessary measure." (R. 28.) In

the language of this Court in the *Forbes Boat Line Case, supra*, that is merely "putting something of a gloss upon the facts." To say that the pensions are measured by the prior service is to concede that they are based on prior service, because if there were no prior service the pensions, to the extent of billions of dollars, would not accrue. If the "measure" is beyond the reach of the legislature, so is the pretended regulation that is based on and related to that measure.

Even in the broad field of taxes, it has been held that those subject to taxation may not be assessed according to a measure or yard-stick of property or transactions unrelated to subject matter within the constitutional power of the legislative body. In *Frick v. Pennsylvania*, 268 U. S. 473, 494, the Court said:

> "One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. * * * Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114, and cases cited; *Looney*

v. Crane Company, 245 U. S. 178, 188; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 141; *Air-Way Corporation v. Day*, 266 U. S. 71, 81; *Wallace v. Hines*, 253 U. S. 66, 69; *Louisville and Jeffersonville Ferry Company v. Kentucky*, 188 U. S. 385, 395."

To the same effect are *Union Tank Line Co. v. Wright*, 249 U. S. 275; *Lewellyn v. Frick*, 268 U. S. 238; *Schlesinger v. Wisconsin*, 270 U. S. 230; *Hooper v. Tax Commission*, 284 U. S. 206.

The Court has frequently considered the constitutionality of legislation which attempted to reach back into the past by the retroactive application of new rules to past transactions.

William Danzer Co. v. Gulf R. R., 268 U. S. 633, involved a provision of the Transportation Act, 1920, that the period of federal control should not be computed as part of the period of limitation in actions against carriers in certain causes arising prior to federal control. The Court pointed out that the cause of action in question was created, as well as limited, by the Interstate Commerce Act, thereby distinguishing statutes of limitations relating to the remedy only, and said:

> "But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act; *The Harrisburg*, 119 U. S. 199, 214; and those arising under the Federal Employers' Liability Act, c. 149, 35 Stat. 65. *Central Vermont Ry. v. White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199, 201; *Kaunellos v. Great Northern Ry. Co.*, 151 Minn. 157, 160; *Jones v. D. L. & W. R. R. Co.*, 96 N. J. L. 197. See also *Davis v. Mills*, 194 U. S. 451, 454. This case belongs to the latter class. Section 206 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment." (Citing authorities.) (637).

In *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U. S. 23, the utility had accumulated a depreciation fund in prior years which was said to be excessive, and the regulatory body in fixing rates for the future undertook to require that the depreciation reserve of the prior years be used to make up deficits in subsequent years.

Holding this requirement invalid, the Court said:

> "The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation, is the company's compensation for the use of its property. If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395; *Georgia Ry. v. R. R. Comm.*, 262 U. S. 625, 632. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future." (Citing authorjties). (31-32).

Nichols v. Coolidge, 274 U. S. 531, is one of several cases holding retroactive federal inheritance tax legislation violative of the Fifth Amendment. The question involved was stated by the Court as follows:

> "The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?" (542.)

The Court disposed of that question in the following language:

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. • • •

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co. v. Edwards*, 267 U. S. 442, 450. See also *Knowlton v. Moore*, 178 U. S. 41, 77. 'And we must conclude that Sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation.'" (542-543).

In *Blodgett v. Holden*, 275 U. S. 142, the Court passed on the provision of the Revenue Act of 1924 which undertook to impose a tax on gifts consummated prior to enactment. The Court said:

"As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." (147).

To the same effect, *Untermyer v. Anderson*, 276 U. S. 440.

To support the provision for prior service pensions petitioners (Br. 120) cite *Hawker v. New York*, 170 U. S. 189, and *Cox v. Hart*, 260 U. S. 427.

The *Hawker Case* involved a statute prohibiting the practice of medicine by one convicted of a felony. The defen-

dant had been convicted of abortion before that statute was adopted, and protested against his exclusion from practice, contending that he had already been punished for his crime, that this disqualification was an additional penalty, and was *ex post facto*. The inapplicability of this decision is obvious; the moral defect which made him unfit to practice medicine reached into the future.

In the *Cox Case* (in which the petitioners, Br. 120, say that an Act of Congress was attacked "upon a ground similar to that urged here"), there was involved a statute which restricted the right to make entry of desert land to surveyed public lands, but which contained a proviso that any qualified individual "who has, prior to survey, taken possession * * * and has reclaimed * * * the same," should have the preference right to make entry within a specified period of time. From the opinion in that case, the petitioners' brief (page 120) quotes the following sentences:

> "The language in terms applies to one who at the time of the enactment occupied a particular *status*, viz: the status of a person who *has done* the things enumerated. A statute is not made retroactive merely because it draws upon antecedent facts for its operation."

These two sentences are, in the opinion, immediately preceded by the following:

> "The effect of the substantive enactment was to forbid the entry of unsurveyed lands. But the law theretofore had been otherwise and one purpose of the proviso evidently was to *exclude from the operative effect of the new rule* cases which might have arisen under the prior law,—that is cases of persons who had taken possession of and undertaken to reclaim unsurveyed lands at a time when the law conferred the right to do so. Any such person, no less than one who acted subsequently, is within the words of the proviso. He is literally 'a person who has, prior to survey, taken possession,' etc. The proviso so construed impairs no

vested right and brings into existence no new obligation which affects any private interest. No reason is perceived why the words employed should not be given their natural application and so applied the case of appellee is included. Indeed, this does not give the proviso a retroactive operation." (435).

Thus, it is clear that when the Court in the *Cox Case* stated that the statute "draws upon antecedent facts", it had in mind that it did so not to *impair*, but to *preserve* antecedent status.

On page 120-121 of their brief, petitioners say:

> "The payment of pensions, under State pension laws, has been several times sustained, although the service periods of the pensioners in part antedated the laws, in the face of express constitutional prohibitions against the payment of additional compensation for services previously rendered and paid for."

To support that text several state court cases are cited. In all of those cases, unlike the situation here, service subsequent to enactment was necessary for eligibility to pensions. The state statutes providing for pensions were upheld, because the states themselves were the employers and as such were free to reward future service of their employees in any way they chose. That is what the state cases cited by petitioners hold, and with that holding we do not quarrel.

The moment before enactment of the Railroad Retirement Act, the carriers were free of debt to their employees for services performed during previous years, because, in fact and according to the current law of the land, they had paid in full. Each carrier was then entitled to assume that its balance sheet reflected all obligations growing out of the past. The moment after enactment, if the Act be constitutional, the carriers found that their balance sheets had understated their liabilities to the extent of billions of dollars. In the case of the 1,164,000 employees in service at the time

of enactment, as in the case of the 146,000 who were not then, but during the previous year had been, in service, there instantly sprang into being by legislative fiat, not dependent upon the performance of even a day's service thereafter, an obligation to contribute in the future billions of dollars towards bounties for these 1,310,000 persons, because, and only because, they had worked for the railroads in the past. At the instant of the approval of the Act, if it be constitutional, each of these 1,310,000 persons was endowed with a bounty, dependent upon no contingency whatsoever except eventual attainment of the statutory pension age. Thus they were presented with something akin to a paid-up insurance policy collectible in the form of annuities. To these annuities, the respondents must contribute two-thirds although they cannot recover from the shippers and passengers of past years any of the additional expenses for those years that the Act now retroactively imposes.

The trial court held the Act unconstitutional because of its requirement that the respondents contribute "huge sums of money to be devoted to the payment of pensions or annuities based upon services long since completed and fully paid for". (R. 264). That holding was right, and conforms to the rudiments of fair play inherent in due process.

IV.

THE ACT IS UNCONSTITUTIONAL IN THAT IT UNLAWFULLY UNDERTAKES TO MINGLE AND POOL THE RESOURCES AND OBLIGATIONS OF THE CARRIERS AMONG THEMSELVES AND WITH OTHERS.

Under the Act payments into the fund by individual carriers are based upon their respective payrolls. (Sec. 5.) Withdrawals from the fund are dependent upon the drain on the fund for annuities of all employees of all carriers (Sec. 8), which in turn is dependent upon age and service characteristics varying widely among the carriers. The drain upon the fund governs the uniform rate (Sec. 5). Each carrier's payment into the fund is measured by its own pay-

roll; drain on the fund is measured by something entirely different depending on conditions existing as to the carriers as a whole.[1]

The proof makes it clear that to the extent of millions of dollars certain carriers under the Act must disburse their money for others, without even promise of equalization. This is true because of proved differences in age characteristics of personnel of individual carriers, and proved differences in their financial condition.

The facts with reference to most probable age of entry into service of typical railroads were proved by petitioners themselves. For one carrier it is 28.4; for another 34.2; for another 29.3; for another 32.4 (R. 189). These are illustrative. Age of employees to a controlling degree will measure mathematically the burden which the Act creates in respect of the employees of any individual employer. A variation of nearly six years suffices to demonstrate the substantial nature of the inequality which will result from this Act.

Again, if the Act be valid, all employees of age seventy or more must retire immediately. Fifty-six of the respondents have no such employees but must contribute for pensions of such employees of other respondents nearly $4,000,000 the first year and nearly $33,000,000 in all (R. 270, Finding 24). Petitioners in effect admit this (Br. 143) but seek to escape from its result by referring to Mr. Latimer's assertion that this "is no criterion of ultimate cost," explained by his declaration which immediately follows,

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[1] The report of the Senate Sub-Committee on this measure declared (Congressional Record, Vol. 78, p. 5699): "It is agreed that all railroads which have been subjected to the jurisdiction of Congress are to be treated together as one employer. All persons in the service of the railroads are to be regarded as employees of the one employer. * * * The old age pension or annuity is to be based upon the wages and the length of service upon all railroads, with specified maximum limits."

that "the cost differentials which are involved are negligible as compared with the total cost."

This statement in petitioners' brief means that in their view this group of railroads should not complain if in disregard of their ownership of their funds, and their constitutional rights incident to such ownership, they are compelled to part with $4,000,000 of their money now and about $33,000,000 as time goes on, because before they run the gamut of the Act they will be compelled to part with many billions more. This indifference to the rights of respondents only reflects what is inherent in the Act as a whole. The Act in its entirety is built upon the theory that the carriers have lost their proprietorship, and that complete dominion over them rests in Congress.

Again, some carriers are solvent, some are insolvent, some are alive only through support of Government loans. Petitioners say (Br. 62) the compulsory and industry-wide character of the proposed system may furnish sufficient assurance to employees. This is merely to say that from its very nature the Act will require that solvent carriers must furnish funds to meet its demands upon insolvent carriers. This is not conjectural. From the outset existing carriers would have to pay pensions to former employees of many carriers no longer in existence. Between June 27, 1933, and October, 1934, twenty-five of them went out of existence and one hundred eighty-four of them went out of existence during the past thirteen years. (R. 271.)

Petitioners in effect (Br. 134-135) admit these facts, and outline the treatment which the Act accords employees of these defunct carriers. That outline discloses no defense, but only that they are treated exactly as are the employees of surviving carriers, thus demonstrating the very thing complained of—that service for defunct carriers is added to service for existing carriers in computing the pensions, and that the pensions must be paid *in toto* by the existing carriers, the defunct carriers paying nothing.

Against this inexcusable inequity the only gesture of

defense is the statement that the amount will be negligible. The amount cannot be computed, but it is whatever will result from the complete abandonment of an average of twelve carriers each year leaving no successors. The fact that billions are at stake in other features of this Act should not obscure this proposed violation of the due process clause.

Here petitioners rely upon their theory that the concept of a national transportation system eliminates all necessity for recognition of separate ownership of railroad properties, revenues, and funds, and separate responsibility of the independent carriers, a theory which we shall discuss in the next section of this brief. They say:

> "Where, as is the case with interstate carriers in this country, common facilities are used, and through routes exist, inter-action among the carriers is bound to exist. To the extent that any link in the transportation chain may be lacking in efficiency, the transportation system as a whole is affected." (Br. 141)

As an aphorism this might be true, but does it result that if one carrier needs heavier rail which it has not money to buy Congress would have power to require the other railroads to furnish and install it? If petitioners' reasoning be correct, Congress would have that power, as illustrated by the language of petitioners which immediately follows that last quoted:

> "Since the railroads (as well as the public) have a common interest in the efficient performance of the transportation system as a whole, it is proper and necessary to require them to contribute to the cost of the plan which is designed to that end, without regard to the distribution among them of superannuated employees at the present time and regardless of differences in age classifications or service periods of their particular employees." (Br. 141-142.)

In *Central R. R. of New Jersey v. United States*, 257 U. S. 247, 259, the Court expressly declared that even engaging

in joint through business does not make connecting carriers partners; and in *Interstate Commerce Commission v. Oregon-Washington, R. R. Co.*, 288 U. S. 14, 40-41, the Court stated that the Transportation Act has not abolished the proprietorship of carriers.

This has always been recognized. In *L. & N. R. R. v. Stock Yards*, 212 U. S. 132, 144, this Court indicated the probable constitutionality of a state law requiring interchange of equipment for through traffic between railroad carriers, but declared

> "We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use."

The judgment reviewed in that case required a carrier to perform both carriage and terminal service but provided compensation for the carriage alone. This Court pointed out that if that were sound in principle every connecting railroad could get free use of costly terminals and said:

> "To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone." (145)

Heretofore Congress has recognized expressly that railroads cannot lawfully be compelled to share their property without compensation.

Congress deemed it necessary to require railroads upon occasion to subject their terminals to the use of others, and it so provided in paragraph (4) of Section 3 of the Act to Regulate Commerce as amended by Transportation Act, 1920; but only upon such terms and for such compensation as the carriers may agree upon, or if they fail to agree, on

terms and for compensation to be ascertained as in condemnation proceedings subject to review in the courts.

Congress deemed it necessary to require one railroad upon occasion to permit another to use its equipment, and it so provided by paragraph (15) of Section 1 of the same Act; also to require routing of traffic of one carrier over lines of another at times, and it so provided by paragraph (16) of Section 1 of the same Act; but in each case only upon such terms as the carriers may agree upon, or as the Interstate Commerce Commission may find just and reasonable after hearing in the event of their disagreement.

This Act deals with carriers as co-proprietors or partners or joint obligors, and to support it petitioners refer (Br. 145) to the decision on divisions of joint revenue and that on recapture, mistaking their effect as we shall show in the next section of this brief.

Petitioners rely on *Noble State Bank v. Haskell*, 219 U. S. 104, sustaining a depositors' guaranty fund derived from assessments against banks to secure bank deposits, and *Mountain Timber Company v. Washington*, 243 U. S. 219, sustaining industrial pools for payment of workmen's compensation. In neither of those decisions was it shown that there actually existed any difference in situation or circumstance which would cause the law to operate with inequality.

In the *Mountain Timber Company Case*, the court expressly declared:

> "In the present case *it will be proper to consider*: * * * (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation." (238).

The Court discovered a legislative declaration that the hazards of particular plants were equal and found no showing of erroneous classification. It therefore deferred to the legislative judgment, declaring (237-238) that "all reasonable presumptions are in favor of its validity, and the bur-

den of proof and argument is upon those who seek to overthrow it", and then declared:

> "But in the absence of any particular showing of erroneous classification *and there is none* the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves," (242).

In the *Noble State Bank Case* inequality was not even pleaded. Since it was decided upon demurrer the facts were confined to plaintiff's allegation of its own solvency, referred to at page 109 of the opinion, with no showing by plea or proof that the law would require it to associate itself in obligation with banks insolvent or less solvent.

In both those cases plaintiffs relied only on their own argumentative predictions to overthrow legislative assertion of equality. In the case at bar we rely not upon argument or prediction but upon inequalities pleaded in detail, proved as facts and found to be true by the trial court.

Petitioners' brief (146) closes treatment of pooling with a quotation of the following sentence in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, which involved solely the validity of a bill of lading purporting to limit liability of the initial carrier and which did not involve plea or proof of actual inability to recover from a connecting carrier:

> "That there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation."

To make this fragment understandable we quote the following language from the decision:

> "The methods in vogue, as the Court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt

> settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have. These well known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves." (203-204)

Perhaps there could be no better illustration of the distinction between the decisions relied upon by petitioners, involving only conjectural inequality, and the case at bar, involving huge inequality, pleaded, proved, and in effect admitted. Our case involves not the mere possibility that an admitted legal right to recoupment may prove in fact ineffective. Here there is no legal right to recoupment at all.

In respect of employees of carriers which have or shall become extinct, and in respect of employees of carriers having personnel of widely different age characteristics, the pooling provisions will create inequitable burdens, which obviously will be large though the amount cannot be computed with exactitude. In respect of employees of 70 or over these provisions create inequitable burdens aggregating nearly $4,000,000 at once, and in all $33,000,000. These provisions, and with them the Act as a whole, since they are its foundation stone, are void for their violation of due process.

V.

THE CONCEPT OF "A NATIONAL TRANSPORTATION SYSTEM" AND THE DECISIONS UNDER TRANSPORTATION ACT, 1920, ARE NO SUPPORT FOR THIS ACT.

Petitioners rely on the concept of a national transportation system to support the Act as a whole. At page 22, under "Power of Congress," they say:

> "Congress is authorized to enact a compulsory retirement and pension law applicable to interstate carriers in the interest of promoting efficiency and safety in interstate transportation, of improving labor conditions and relations, and of *'fostering' and 'protecting' the national transportation system.*"

The very first sentence in "Argument" (Br. 34) is a like declaration. At pages 102 to 106 and at 154 they argue and emphasize this concept to excuse the inclusion of all employees whether engaged in interstate transportation or not.

At pages 32 and 141 they present the theory to support the pooling provisions of the Act and at page 28 to support their argument as to the manner in which annuities are to be computed. At page 34 there is an indirect but unmistakable reference to the concept as justifying the huge financial burden to be placed on the carriers.

Another illustration of unwarranted reliance upon the national transportation system concept is found in the argument of petitioners (Br. 77) based upon the statement of Mr. Latimer (R. 225), that in so far as the voluntary pension systems have stood in the way of free transfer of employees from one carrier to another those systems have thwarted the achievement of the national policy.

These and other illustrations contained in petitioners' brief merely reflect the fundamental error which is inherent in the Act itself. It assumes that because respondents engage in interstate transportation Congress has power abso-

lute and without limitation to control all their property and affairs. Despite the unmistakable declarations of this Court to the contrary, they seek to support this assumption by the fact that Congress by Transportation Act, 1920, introduced into federal legislation a new railroad policy by which it sought to ensure adequate transportation service; but they wholly mistake the nature of the new policy.

The new railroad policy was stated in the *New England Divisions Case*, 261 U. S. 184, 189-190:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service."

To carry that new policy forward Congress, which theretofore had engaged almost wholly in corrective legislation, devised the protective legislation represented by the Transportation Act. That protective legislation in some cases ran to individual carriers, and in some cases to carriers as a whole or in groups. Features running to individual carriers, for example, are federal control over abandonments and issuance of securities. Features running to groups of carriers, for example, are the rate-making features designed to secure a fair return on value by groups, carrying with them the recapture provision for the adjustment of excess earnings and the provisions relating to divisions. Both features recognize and are designed to protect the broad necessity for sufficient transportation facilities, but neither involves depriving any carrier of its property or requiring it to surrender its property for the benefit of any other carrier.

In *Central Railroad of New Jersey v. United States*, 257 U. S. 247, 259, a case involving actual joint activity of car-

riers, it was held that connecting carriers, participating in joint rates, are not thereby made partners; and in *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U. S. 14, 40-41, the Court said:

> "The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. The Transportation Act has not abolished this proprietorship."

Petitioners' error in this respect is made manifest by examination of the authorities discussed at pages 83 to 92 of their brief.

The recapture provisions of the Transportation Act were sustained in *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 484, but only upon the theory that, under the rates proposed and promised by that act, a carrier receiving earnings in excess of the prescribed fair return never became the owner of such excess but received it and accepted its custody as a trustee and not as owner.

In *New England Divisions Case*, 261 U. S. 184, 195-196, the Court sustained joint revenue divisions based in part on comparative needs of participating carriers, but the joint revenues were the proceeds of rates allowed or prescribed to meet carriers' joint needs; and the Court held that division on the same basis did no more than carry into effect the purpose for which the rates producing the revenues were authorized in the first place.

These cases merely recognize the concept of a national transportation system, as to which, within constitutional limitations, Congress has power to enact legislation. They do not destroy those constitutional limitations.

Petitioners' discussion (Br. 83-92) indicates the belief that the advent of this new policy of legislation justifies the thought that congressional power, through the sheer momentum of its own exercise, may pass effectively across the line which lies between the constitutional and the un-

constitutional, despite the fundamental principles and repeated decisions of this Court which stand in the way.

None of the decisions cited by petitioners (Br. 85-92) discloses abandonment of any principle of constitutional limitation recognized before Transportation Act, 1920, was adopted. This is illustrated by *Illinois Commerce Commission v. United States*, 292 U. S. 474; *United States v. Louisiana*, 290 U. S. 70, 75; and *Wisconsin Railroad Commission v. C. B. & Q. R. R.*, 257 U. S. 563, cited by petitioners, dealing with federal control of intrastate rates. These cases arose under Section 13 of the Interstate Commerce Act, as amended by the Transportation Act. But that section is a mere statutory development of the principle recognized in the *Shreveport Case*, 234 U. S. 342, decided in 1914, six years before Transportation Act, 1920, was adopted; and that principle was repeated in *Florida v. United States*, 282 U. S. 194, 210-212, eleven years after it was adopted, with the declaration that in the absence of interference with interstate commerce the federal power does not extend to the control of intrastate rates, despite Section 13.

Since *Gibbons v. Ogden*, 9 Wheat. 1, it has not been doubted that Congress has power to protect interstate commerce. All of the decisions referred to by petitioners in this connection illustrate that protection in some form. *Transit Commission v. United States*, 284 U. S. 360; *Colorado v. United States*, 271 U. S. 153; *T. & N. O. R. R. Co. v. North Side Belt Ry. Co.*, 276 U. S. 475, 479; and *Texas and Pacific Ry. Co. v. Gulf, etc., Ry.*, 270 U. S. 266, 277, cited by petitioners at page 86, have to do with extensions or with abandonments of lines under paragraph (18) of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920. As to abandonments, the protection accorded is protection of an individual railroad against burdensome branches which, if retained, would impair the efficiency of the entire transportation service performed by it; or protection of the public, dependent on it

for transportation service, against improvident abandonment of necessary trackage. That the new policy in railroad legislation did not go to the point of creating federal control over intrastate transportation irrespective of its significance in connection with interstate transportation, is disclosed abundantly by comparison of *Colorado v. United States*, 271 U. S. 153, with *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 216-218.

The cited cases involving extensions are mere illustrations of protection of instrumentalities of interstate commerce from unbridled competition among themselves, quite similar to the protection of the public against destruction of competition in service illustrated by the exercise of federal power to supervise acquisition of control of one carrier by another. *Chicago Junction Case*, 264 U. S. 258, and *Texas v. United States*, 292 U. S. 522.

Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U. S. 244, is a case of protection of the right of the public to efficient interstate transportation service by federal control of the establishment of junctions and physical connections between interstate carriers, just as the regulation of securities in *United States v. C. M. St. P. & P. R. R. Co.*, 282 U. S. 311, cited by petitioners, is designed to preserve the ability of the carriers to serve the public. Interstate Commerce Act, Sec. 20(a).

Atlantic Coast Line R. R. Co. v. United States, 284 U. S. 288, cited by petitioners, is an illustration of protection of service of the public by economical joint use of facilities, the owner being compensated for their use.

It is not necessary to analyze separately the facts or the language of these decisions, but it should be noted that throughout all of them runs, either by outright expression or necessary implication, the thought of an intermingling of intrastate and interstate commerce—the very thought which underlies the statutes having to do with safety appliances and hours of service and the decisions on them cited by petitioners at page 87 of their brief.

All these cases reduced to their essentials are applications of two rules: first, that the power of Congress to regulate commerce includes the power to protect it; and, second, that Congress is not to be defeated in the effective exercise of that power merely because through commingling of intrastate and interstate commerce its effective exercise would necessitate the inclusion of some objects which otherwise would be beyond congressional reach. Those rules we do not question, but they do not support the Railroad Retirement Act.

The concept of a national transportation system cannot be so broadened as to give to Congress the power which petitioners assert for it, to legislate with reference to all the affairs of carriers which conduct interstate transportation whether those affairs concern interstate transportation or not, or to give it the power to take the property of one carrier and give it to others or to the employees of others.

VI.

THE ACT VIOLATES THE FIFTH AMENDMENT BECAUSE IT IS ARBITRARY, UNREASONABLE, CAPRICIOUS AND OPPRESSIVE.

This Act presents the plainest possible case of the taking of huge sums of money from the railroads and giving them to ex-railroad employees—not for services rendered or for any other consideration, but solely upon the theory that the promise of a bonus in the future will, in some intangible way and to some indefinite extent, affect their feelings so as to promote efficiency and safety in interstate transportation.

This Act fails to meet an essential requirement of due process, which has been laid down in many cases involving attack upon a statute or other public regulation as violative of due process. This important requisite is that a statute which takes one's property must not be *arbitrary, unreasonable, capricious or oppressive.* Accordingly, if the Act is

arbitrary or unreasonable or capricious or oppressive, the requirement of due process has not been met and the Act is unconstitutional.

One of the latest statements of the well known due process requirements is in *Nebbia v. New York*, 291 U. S. 502, in which the Court said:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not *prohibit* governmental regulation *for the public welfare*. They merely *condition* the exertion of *the admitted* power, by securing that the end shall be accomplished *by methods consistent with due process*. And the guaranty of due process, as has often been held, demands only that the law *shall not be unreasonable, arbitrary, or capricious*, and *that the means selected shall have a real and substantial relation to the object sought to be attained*." (525).

Heretofore it has been generally recognized as to voluntary industrial pensions that they are gratuities, and this Court has held that military and naval pensions granted by the United States are gratuities. In *Lynch v. United States*, 292 U. S. 571, 576-577, the Court declared:

> "War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. (Citing authorities.) On the other hand War Risk policies, being contracts, are property and create vested rights."

Never before has there been a statute, federal or state, which undertook to impose upon any industry or business, even though affected with a public use, the obligation to pay

pensions. Obviously, a pension law either prescribes a naked gratuity, which of course would be invalid, or it provides something in the nature of additional compensation for work done, but payable after and extending beyond the period of employment. This Act is most analogous to those which have undertaken to fix wages. But this statute goes much further for it does not apply until after the employment relationship has been terminated.

The Court has considered wage-fixing statutes in three cases: *Wilson v. New*, 243 U. S. 332, sustaining the validity of the Adamson Law on the ground of emergency; *Adkins v. Children's Hospital*, 261 U. S. 525, holding invalid a statute prescribing minimum wages for women in the District of Columbia; and *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, which held void a Kansas statute regulating wages.

The statutes involved in the second and third of these cases, the latest ones, were held to be unconstitutional because violative of due process; in the first one, *Wilson v. New*, the statute was upheld, but it is not an authority in favor of sustaining the Railroad Retirement Act. Both the reasoning and the decision in that case furnish a sound argument against the validity of this Act, because the Court indicated that anything short of a desperate condition, such as was there involved, would never suffice to justify the wage-fixing feature of that act. In the subsequent case of *Wolff Packing Co. v. Court of Industrial Relations*, the Court, in holding invalid the statute there involved, emphasized the thought that nothing short of the grave emergency involved in *Wilson v. New* was or would have been considered as justification for the Adamson law, declaring, "it is not too much to say that the ruling in *Wilson v. New* went to *the border line* although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster."

It will be remembered that the majority, in upholding the Adamson Law, based its opinion *solely* upon the emer-

gency created by the impending nation-wide strike of the trainmen which the Court said would involve "the stoppage of interstate commerce" and create an intolerable situation, which, in a declarative question the Court asserted would, if not remedied, "leave the *public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character?*" (351).

Wilson v. New involved a national emergency; there is no such element in this case. The Adamson Law imposed burdens that were temporary in character, lasting only seven months; the burden imposed in this case is recurring and permanent, with the annual charge ultimately increasing far beyond the initial figure of sixty million dollars a year. The Adamson Law required a temporary increase in wages of only certain designated railroad employees, those in train service; the Retirement Act not only is permanent but extends to all ex-employees, whatever their work had been. The Adamson Law regulated payments to employees for work done while the relation existed; the Retirement Act requires payments after the employment relation is ended.

Although the Court sustained the temporary and limited wage-fixing provision of the Adamson Law in *Wilson v. New*, under the emergency conditions there existing, it was careful to declare the general rule applicable in the absence of such conditions, saying:

> "That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the es-

tablishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority." (347).

In *Adkins v. Children's Hospital*, the Court held unconstitutional, as violative of the due process clause of the Fifth Amendment, an act of Congress applicable to all women workers in the District of Columbia which undertook to provide for a minimum wage, sufficient to supply the necessary cost of living and to maintain them in good health. The Court held that act unconstitutional in spite of reliance by the Government upon *Wilson v. New*.

In the third and last of these decisions on wage-fixing statutes, *Wolff Packing Co. v. Court of Industrial Relations*, the Court held unconstitutional a statute of Kansas undertaking to compel employers and their employees to submit controversies over wages to state arbitration and to require the employer to pay the wages fixed by the arbitration. The decision in *Wilson v. New* was strongly relied upon to sustain the constitutionality of the Kansas statute, but the Court held that that statute violated due process of law and was void.

We now group the arbitrary, unreasonable, capricious and oppressive features of the Retirement Act which bring it in conflict with the Fifth Amendment.

1. The Act Requires Payment of Pensions Even to Those Who Are Not in Railroad Service.

In addition to covering those employees who were in railroad service at the time of or subsequent to the approval of the Act this statute reaches back and includes all who at any time prior to said date had been in the employ of any railroad but had discontinued their railroad service before the Act was passed. These ex-employees are divided by the Act into two classes: (1) those who had thus left the service within one year before the approval of the Act, that is between June 27, 1933, and June 27, 1934 and (2) those who had left the service before June 27, 1933.

As to the first group, which numbered 146,000 persons (R. 269), though they had quit the service and had not returned, nevertheless they will receive pensions when they reach 65 years of age regardless of whether they ever again enter railroad service. The pension is based on the number of years (not exceeding 30) of past service. These persons receive in the aggregate an enormous bonus or gratuity merely because of the historical circumstance that they once were railroad employees. As to such of these as do not re-enter railroad service (and the pension does not depend on re-entry) there is not even the chance or opportunity for the payment of these bounties to make them more efficient or to affect their relation to the railroads in any way whatever, for the only relation which had ever existed had ceased before the Act was passed. Such a provision is clearly capricious and unreasonable.

Petitioners undertake (Br. 125-127) to defend this feature by referring to varying practices as to furloughs, saying in effect that without such a provision railroads, in order to avoid pension obligations, would fail to call back into service furloughed and so-called stand-by employees. That does not depend upon the will of the railroads. It is governed by specific agreements creating seniority right to return to service which put it beyond the power of railroads to deal unfairly, as petitioners without factual support intimate they might.

The meat of this matter has nothing to do with furloughs; it has to do with proved facts which are not seriously in dispute. The statement is incorrect (Br. 129) that respondents' evidence is based on the guess or judgment of their officers as to whether employees would return; the officers were asked to state facts within their knowledge and they stated them. The conclusion to be drawn from those facts is that dictated by common sense. Men dismissed for cause, or resigning to go into other business, or leaving service on completion of work known to be temporary, or leaving because their positions are abolished

or at the termination of seasonal work are illustrative. The exact number who will never return is not important; it suffices that in the aggregate there are many thousands of them, probably 81,786, certainly as many as 50,000. (R. 49-55, 137-138; Finding 17, R. 269).

If a man returns to service his past service is recognized fully, whether he left service one year or twenty years before the Act was adopted, so there could have been no reason for this requirement in order to take care of temporarily furloughed men who return to service. The point as to the man who left within one year is that he can get a pension without returning to service at all, and the point is supported by the proof that large numbers of them will not return.

Petitioners assert that the Act as to these men is separable. This we deny on authority of the principles announced in the decisions cited *supra*, pp. 59-60.

The second class of ex-employees who under the Act are entitled to receive pensions, are those who left the service prior to the one-year period, that is, prior to June 27, 1933, provided they return to service of any railroad subsequent to the enactment of the Act. There are a million of these. (R. 266, Finding 8). Petitioners in their answer (R. 27, VI, 2) say they "believe the estimate of one million to be reasonable." One day of subsequent carrier employment will make each of them eligible to pension under the Act for whatever service he had with any carrier in the United States in the past, not exceeding 30 years. This seems almost beyond belief, but it is true.

The Act hangs up before each of these million men the promise of an annuity to be paid him from the time he becomes 65 until his death, conditioned only upon one thing—securing a job, even if but for one day, with any one of the 700 American railroads. The plain instinct of human nature would impel these men, if it is at all possible, to go after this bonus, and that without being subject to criticism, since the law declares their right to it.

Petitioners argue (Br. 122) that it is distinctly within the control of the carriers to prevent former employees with long service periods from re-entering service. This ignores the practical fact that re-employment by any one of 700 carriers will bind all the other carriers, and it ignores the fundamental principle that Congress cannot compel one to accept his own vigilance, much less that of thousands of employing officers of 699 others over whom he has no control, as a substitute for the protection of the Constitution. One assailed by an unconstitutional law need not retreat to the wall.

Under our institutions mere lack of care on the part of the subject does not add to the power of the sovereign. In *Louisville & Nashville R. R. Co. v. Stock Yards*, 212 U. S. 132, 144, the Court declared that the unconstitutionality of a law cannot be cured by including its lacking requirements in a judgment under it, and the Court said, "The law itself must save the parties' rights and not leave them to the discretion of the courts as such." That being true, surely Congress had no power to set this unconstitutional trap, leaving the parties' rights not even to judicial discretion but to their own watchfulness and that of a great number of others.

Further, if ever so watchful, it will be impossible for each of the 700 railroads to know the past record of these million men, and many thousands undoubtedly will secure some sort of railroad employment in order to get these valuable annuities. Casual work will suffice; one day on a section, and emergency work in train service, accounting, or clerical service are illustrative.

Petitioners say (Br. 122) that employment by one carrier of an ex-employee of another is unlikely. Their own evidence refutes this, for Mr. Latimer declares (R. 225) that the study of railroad employment conducted by him under the supervision of the Federal Coordinator of Transportation disclosed that 22 per cent of railroad employees in railroad service January 1, 1934, had prior service with some

railroad other than their then employer. From petitioners' argument it is fairly to be inferred that according to their view the Act intends to require that carriers refrain from hiring any of these million men. By what constitutional authority may the Act place a penalty on all the carriers if any one of them dares employ any of these men?

2. Other Arbitrary Features.

Without unnecessary repetition we desire to emphasize the arbitrary, unreasonable, capricious, and oppressive nature of certain features of the Act some of which we have already discussed under other topics.

The Act is Unreasonable in Requiring Pensions to be Paid Employees who Left the Service Prior to the Retirement Age.

The employee may quit railroad service at the age of 50 or 40, or any other age, to enter some other business, or for any other reason, and never return to railroad service again, yet he gets his pension when he reaches 65, based upon the length of his actual service. This means that the employee's pension is a simple bonus in the form of a paid-up annuity such as can be bought from insurance companies, but which the Act requires the railroads to give him solely as a reward for past service already compensated.

The Act is Unreasonable in Requiring the Payment of a Pension for 30 Years of Service Regardless of the Age of the Employee.

An employee who has a service period of 30 years does not have to wait until he is 65, but can get his pension at any time, subject only to the provision that if he takes it before he becomes 65 there is a reduction of 1/15th of the amount for each year the employee is less than 65 years of age at the time of the first annuity payment, except in case of retirement because of physical or mental disability. Pe-

titioners, in defense of this provision, claim that this reduction will deter most 30-year service men from demanding pension until they are 65. But they none the less have the right, which doubtless many will exercise, to take the pension at any age above 51.

There are at the present time more than 100,000 employees in the service of the carriers between 51 and 65 years of age, who have had not less than 30 years of carrier service. It is in the interest of the service that these competent and efficient employees be retained for the benefit of their skill and experience (R. 270, Finding 21), and the option given them to retire with pensions is not aimed at any necessity of interstate transportation, for it leaves it to the employee to decide on personal grounds.

The Act is Unreasonable Because There is Included, as the Basis of the Pension, Service Rendered Prior to the Passage of the Act.

This subject is fully discussed, *supra*, pp. 63-76, and is referred to here as an important one in this group of the arbitrary and unreasonable features of the Act itself. This retroactive operation of the Act alone will ultimately cost respondents approximately three billion dollars.

The Act is Unreasonable Because it Arbitrarily Pools the Obligations, Funds, and Affairs of all Carriers.

This subject is fully discussed *supra*, pp. 76-83. The unreasonable classification which the pooling provisions represent does not depend upon conjecture; it was proved beyond dispute. The whole scheme of the Act depends upon it.

The Act is Arbitrary in that it Discriminates Against Rail Carriers by Not Including Their Competitors.

Respondents in their bill allege that the Act unlawfully classifies and discriminates against them. (R. 6, 11, 3). The facts as to discrimination have been shown.

It is true that in the past the courts have regularly sustained laws applicable to the railroad industry and not to other industries or to the public generally on the ground that such a classification of railroad carriers and their employees does not violate the Fifth Amendment. The Second Employers' Liability Act was attacked on the ground that it offended against the Fifth Amendment "by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class." *Second Employers' Liability Cases*, 223 U. S. 1, 49. The court held the classification proper. However, that was in 1912. That conditions have changed and that the railroads no longer have a monopoly of the transportation business is a matter of common knowledge and was proved. (R. 44). The competition of carriers by water, highway and airplane is now very serious. Such carriers do not bear the burden of the Railroad Retirement Act. We submit that the classification made by this Act—the application of this law to railroads but not to competing forms of transportation—cannot be justified. The Act is not only arbitrary but denies to respondents the equal protection of the laws.

The Act is Arbitrary and Unreasonable in that it Unlawfully Requires the Railroads to Insure the Employees as to Their Contributions.

The provision of the statute that the employee shall contribute one-third to the total annuity payments is illusory. Primarily, the employee's contribution is a sort of savings account arrangement carried for the employee's benefit along with the pension contributions of the railroads. Every cent of the employee's contributions must in any event come back to him or his estate out of the common fund. Upon death, either before or after annuity payments begin, there must be paid to his estate out of the fund the full amount of his contributions with 3 per cent compound interest less, of course, any amount he may have received upon his annuity. (Section 3). It will thus be seen that the

railroads not only are ultimately liable for their part of the annuities but they in effect insure the employees' part.

The Act is Arbitrary and Unreasonable Because it Authorizes Unlimited and Uncontrolled Expenditures.

The Act in Sec. 2 (b) arbitrarily and unreasonably authorizes the Retirement Board to make unlimited expenditures not only for administration, but also for research for the purpose of procuring information to submit to Congress as a basis of future legislation. All of these expenditures come out of the retirement fund, two-thirds of which is provided by the railroads. Indeed, the railroads bear the whole burden, because, as we have just pointed out, the employees or their estates get back their contributions in full. We submit that the delegation to administrative officers of this unlimited authority to take respondents' property is capricious and arbitrary.

3. The Act is Unreasonable and Void Because of the Unconscionable Cost.

An outstanding feature disclosing the unreasonable and oppressive nature of the Act is the huge amount demanded of the railroads. The initial and minimum requirement is $60,000,000 per annum (R. 269, Finding 19) but this by no means measures the demand. To employees retiring during 1935 the fund must furnish annuities monthly until such employees die. In 1936 another group of employees will retire, adding the cost of their annuities for that year and future years to the cost for those retired in 1935. In like manner the cost of annuities for those retiring in 1937 and year by year thereafter will be superimposed, the aggregate cost to the railroads continually increasing until some date, unpredictable but admittedly many years hence, when mortalities would completely offset retirements, bringing the cost to its plateau.

The petitioners' actuary testified that the annual annuity payments will increase year by year and in the tenth year

will aggregate upwards of $[illegible]7,000,000, but he did not project his estimates beyond that year. (R. 217). However, the record discloses that the railroads' share as to prior service alone of the present employees would be the sum of $2,943,966,000. (R. 209). This gives some idea of the still vaster sums which will be imposed on account of the future service periods of the present employees and of future employees.

This Court in many cases has considered the cost burden imposed by public action in determining reasonableness and constitutionality. In three of the leading cases it has held that the cost burden is an important element of constitutionality. *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510; *Lehigh Valley R. R. v. Commissioners*, 278 U. S. 24; and *Atchison, T. & S. F. R. R. Co. v. Railroad Commission*, 283 U. S. 380, 395.

In the *Fairchild Case*, the Court said:

> "The question in each case must be determined in the light of all the facts, and with a just regard to *the advantage to be derived by the public* and the *expense to be incurred by the carrier*. For while the question of *expense* must always be considered (*Chicago &c. R. R.* v. *Tompkins*, 176 U. S. 167, 174) the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is *bound to perform*, then, *upon proof of the necessity*, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' *Atlantic Coast Line R. R.* v. *North Carolina Commission*, 206 U. S. 1, 27; *Missouri Pacific Ry.* v. *Kansas*, 216 U. S. 262. Where, however, the proceeding is brought *to compel a carrier to furnish a facility not* included *within its absolute* duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider *all the facts*,—the places and persons inter-

ested, the volume of business to be affected, the *saving in time and expense to the shipper*, as against the *cost and loss to the carrier*. On a consideration of such and similar facts the *questions of public necessity* and the *reasonableness of the order must* be determined." (529).

In *Atchison, T., & S. F. R. Co. v. Railroad Commission*, 283 U. S. 380, 395, the court said:

> "But the power to regulate is not unlimited. 'It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.' *Norfolk & Western Ry. Co. v. Public Service Comm.*, 265 U. S. 70, 74; *Mississippi Railroad Comm. v. Mobile & Ohio R. Co., supra.* The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. *Wisconsin, Minnesota & Pacific R. Co. v. Jacobson, supra; Norfolk & Western Ry. Co. v. Public Service Comm., supra.* And 'the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order.' *Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 529."

The applicability of the principle in those cases and the arbitrariness of this Act are emphasized by the desperate financial condition of the industry, shown by undisputed evidence. The huge burdens of this Act are imposed upon the railroads at a time when 42,751 miles of railroad are in receivership or bankruptcy (R. 35); when they are earning in the aggregate only 2.18 per cent of the value of their property before paying fixed charges (R. 41); when after paying fixed charges nearly all of the railroads are in the red (R. 40); when despite the plight of the railroads, labor's depression wage cut of 10 per cent is being restored, involving an increase in the annual labor costs of Class I railroads by more than $165,000,000 (R. 41-42); when other operating costs due to increases in materials and supplies were being raised $125,000,000 during 1934 (R. 43); when approximately 23 per cent of all commercial freight traffic and 35 per

cent of commercial passenger traffic is now conducted by competing forms of transportation (R. 44-45), which not only have seriously reduced the railroads' revenues but for competitive reasons materially militate against their obtaining substantial additional revenues through increased rates. This situation shows that the cost of the Act, whether *per se* or in relation to any imaginable benefit, is from every viewpoint not only unreasonable and oppressive, but prohibitive unless disaster to the railroads is to be invited.

This Act is a statutory demand for payment under present conditions of an enormous amount of money by an industry which is now already in serious financial condition. In addition it is the establishment, under abnormal conditions, of an unconscionable and oppressive charge against the future of the railroads. The effect of that charge on the credit of the railroads, altogether aside from the money which they must now pay out from their depleted treasuries, is staggering. No discussion is necessary for the demonstration of the cold fact that without credit the railroads cannot hope to survive.

Far from being a regulation for the protection or benefit of interstate commerce, this Act is a serious detriment to interstate commerce and to the interests of the public in the maintenance of an adequate transportation system.

CONCLUSION.

Upon all the foregoing, we respectfully submit that the real end and aim of this Act is not legitimate regulation of interstate commerce; that in its nature, scope and essential provisions the Act is not reasonably or substantially related to efficiency or safety in interstate transportation or to any legitimate end within delegated powers of Congress; that the Act exceeds the power of Congress; that it arbitrarily, unreasonably, capriciously and oppressively takes the property of respondents annually and perpetually, in enormous amounts, in violation of the due process clause of

the Fifth Amendment; and that unconstitutionality permeates the whole Act making it void in its entirety.

It results, we respectfully submit, that the decree of the Supreme Court of the District of Columbia should be affirmed.

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March, 1935.

APPENDIX.

RAILROAD RETIREMENT ACT.

[48 Stat. 1283]

AN ACT

To provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means each person in the service of a carrier, subject to its continuing authority to supervise and direct the manner of rendition of his service,

who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service. The term "employee" also includes each officer or other official representative of an "employee organization", herein called "representative", who has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during, or following employment by a carrier, is engaged in such representative service in behalf of such employees.

(c) The term "Board" means the Railroad Retirement Board hereby created.

(d) The term "annuity" means regular payments at the end of each completed month during retirement, ceasing at death or at resumption of compensated service.

(e) The term "service" means the employment relation between an employee and a carrier whether before or after the enactment hereof.

(f) The term "service period" means the total service of an employee for one or more carriers whether or not continuously performed, and includes as one month every calendar month during which the employee has been paid compensation by a carrier and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(g) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(h) The term "age" means age at the latest attained birthday.

(i) The term "carrier contribution" means the payment to be made by each carrier.

(j) The term "employee contribution" means the payment to be made by each employee.

(k) The term "voluntary contribution" means the payment made by an employee equal to the total of both the employee and the carrier contribution.

(l) The term "effective date" means the 1st day of the second month after the taking effect of this Act.

(m) The term "Railroad Retirement Act" means and may be used in citing this Act and subsequent amendments thereto.

PURPOSES

SEC. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this Act to perform and fulfill the obligations imposed thereby. This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

SPECIAL REPORT

(b) Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy and permanency of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations.

ANNUITIES

SEC. 3. Each employee having attained the age of sixty-five years, or having completed a service period of thirty years, shall be paid an annuity, to begin on a date specified in a written application, which date shall not be more than sixty days before the making of the application. No annuity shall begin less than six months after the effective date. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the number of years of service, not exceeding thirty years, by the following percentages of the monthly compensation: 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the com-

pensation in excess of $150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee has received compensation from any carrier out of eight consecutive calendar years of such services ending December 31, 1931. No part of any monthly compensation in excess of $300 shall be recognized in determining any annuity for any employee contribution. The annuity shall be reduced by one fifteenth of such annuity for each year the employee is less than sixty-five years of age at the time of the first annuity payment. No such reduction shall be made if the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. Upon death of an employee before or after retirement an amount, equal at his death to a computation, with interest at 3 per centum compounded annually, of the accumulation from his payments less any annuity payments received by him, shall be paid as he may have designated or to his legal representative. Any employee who upon retirement shall be entitled to an annuity with a value determined by the Board of less than $300 shall be paid such value in a lump sum.

RETIREMENT

SEC. 4. Retirement shall be compulsory upon employees who, on the effective date, have attained or thereafter shall attain the age of sixty-five years. The carrier and the employee may, by an agreement in writing filed with the Board, extend the time for retirement as to such employee for one year and for successive periods of one year each, but not beyond the age of seventy years. Until five years from the effective date, the compulsory retirement shall not apply to an employee who from and after the effective date occupies an official position in the service of a carrier.

CONTRIBUTION

SEC. 5. Each employee shall pay an employee contribution in a percentage upon his compensation. Each carrier

shall pay a carrier contribution equal to twice the contributions of each employee of such carrier. The employee compensation shall be the compensation for service paid to such employee by the carrier excluding compensation in excess of $300 per month. The contribution percentage shall be determined by the Board from time to time, and shall be such as to produce from the combined employee and carrier contributions, with a reasonable margin for contingencies, the amount necessary to pay the annuities, other disbursements and the expenses becoming payable from time to time. Until the Board shall determine on a different percentage the employee contribution percentage shall be 2 per centum. Employee contributions shall be deducted by the carrier from the compensation of its employees and shall be paid by the carrier, together with the carrier contributions, into the Treasury of the United States quarterly or at such other times as ordered by the Board.

EXISTING PENSION SYSTEMS.

SEC. 6. The Board shall have the power to provide by appropriate rules and regulations for substituting the provisions for annuities and other benefits to employees under this Act, for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and to transfer such obligations to the retirement system herein established. If the fulfillment of any such transferred obligation shall require additional contributions or larger payments than would otherwise be required under the provisions of this Act, then such additional contributions shall be made by the carrier originally responsible for the creation of such obligation or for the excess amount of such payments over those which would be required under the provisions of this Act. In the event that the Board is unable to make satisfactory arrangements with any carrier for the substitution of the provisions under this Act for its existing pension system, then, and in that event, the provisions of this Act shall be applied to said carrier and its employees without regard to any con-

flict or duplication in the operation of such an existing pension system and the operation and effect of the provisions of this Act: Provided, That the Board, at its option, shall have power, in lieu of the foregoing provisions of this section, to order that all former employees of carriers, who prior to the effective date have become separated from the service at the age of seventy years or over and who may or may not be receiving age retirement benefits, shall be entitled to the benefits of this Act.

EMPLOYEE REPRESENTATIVES.

SEC. 7. Any representative of an employee organization who is included within the definition of "employee" in paragraph (b), section 1, of this Act shall have the option, but, shall not be required to continue or to become a beneficiary under the provisions of this Act. If he shall elect to continue or to become such a beneficiary he shall pay all voluntary contributions.

For the purposes of this section the requirements of section 4 of this Act shall not apply. Service rendered to an employee organization shall be included in computing the total service period of such representative.

For such representative who shall elect to become a beneficiary under this Act, the basic compensation upon which contributions shall be made and benefits calculated shall be that compensation paid by the carrier for service rendered in the position to which the rights of such representative would entitle him for the period defined in section 3 of this Act: Provided, That if no definite and specific rights obtain, the average compensation paid to the four employees whose last date of entry in the service is nearest the date of entry in the service of the same carrier by such representative, shall be his basic compensation to be determined for the period defined in section 3 of this Act. When a question arises as to rights under this provision the Board shall investigate and determine rights of such representative.

For such representative who elects to continue as a beneficiary under the provisions of this Act, his basic compensation shall be the average monthly compensation paid to him by the carrier during the last twelve months of active service with such carrier.

RETIREMENT FUND

SEC. 8. All moneys paid into the Treasury under the provisions of this Act, all interest, and other receipts, and all refunds of moneys paid out under this Act shall constitute and be kept in a separate fund in the Treasury to be known as the "railroad retirement fund." At the request and direction of the Board, the Treasurer of the United States, with the approval of the Secretary of the Treasury, is authorized to invest such funds as are not immediately required for disbursements in interest bearing bonds, notes, or other obligations of the United States, and to collect the principal and interest of such securities and to sell and dispose of the same as in the judgment of the Board shall be in the interest of said fund. There is hereby appropriated such sums not in excess of the amounts in said fund as may be necessary to pay all annuities, other disbursements and the expenses of administration of this Act.

RETIREMENT BOARD.

SEC. 9. (a) PERSONNEL.—There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years, without recommendation by either carriers or employees and shall

not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of employees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act. The members and employees of the Board shall be included as employees under this Act and together with employees receiving annuities shall be furnished free transportation in the same manner as such transportation is furnished to employees.

(b) Duties. The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall receive and take such steps and institute and prosecute such proceedings and actions as may be necessary to enforce the payments and obligations required under the Act, make and certify awards and payments, and account for all moneys and funds necessary thereto. The Board may require such advances upon the payments of carriers as necessary to put this Act into operation. The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated therefor, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments, and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board and shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the

payments to be required to provide for all annuities, other disbursements and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

COURT JURISDICTION

SEC. 10. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by the Board to compel an employee or other person residing within the jurisdiction of said court, or a carrier subject to service of process within said jurisdiction, to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this Act.

(b) An application by an employee or carrier to the Supreme Court of the District of Columbia or to the district court of any district wherein the Board maintains an office or has designated an agent authorized to accept service in its behalf, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take an action, or to make a decision necessary for the enforcement of a legal right of the applicant, when the applicant shall establish his right to a judicial review upon the jurisdictional ground that, unless he is granted a judicial review of the action or decision, or failure of the Board to act or to decide, of which he complains, he will be deprived of a constitutional right to obtain a judicial determination of his alleged right.

(c) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any

jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

EXEMPTION

SEC. 11. No annuity or death payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever.

PENALTY—CARRIER

SEC. 12. On the failure of any carrier to make any payment when due under the provisions of this Act, such carrier, unless excused by order of the Board, shall pay an additional 1 per centum of the amount of such payment for each month such payment is delayed.

OTHERS

SEC. 13. Any employee, other person, officer, or agent of a carrier subject to this Act who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act or who shall willfully fail or refuse to make any accounting required under this Act, or who shall knowingly make any false or fraudulent statement or report required for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act shall be punished by a fine of not less than $100 nor more than $10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 27, 1934.

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p. 8. dissent

SUPREME COURT OF THE UNITED STATES.

No. 568.—October Term, 1934.

Railroad Retirement Board, et al., Petitioners, *vs.* The Alton Railroad Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[May 6, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondents, comprising 134 Class I railroads, two express companies and the Pullman Company, brought this suit in the Supreme Court of the District of Columbia, asserting the unconstitutionality of the Railroad Retirement Act[1] and praying an injunction against its enforcement. From a decree granting the relief sought an appeal was perfected to the Court of Appeals. Before hearing in that tribunal the petitioners applied for a writ of certiorari, representing that no serious or difficult questions of fact were involved, and urging the importance of an early and final decision of the controversy. In the exercise of power conferred by statute[2] we issued the writ.[3]

The Act establishes a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. There is provision for the creation of a fund to be deposited in the United States treasury (Secs. 5, 8) and administered by a Board denominated an independent agency in the executive branch of the Government (Sec. 9). The retirement fund for payment of these pensions and for the expenses of administration of the system will arise from compulsory contributions from present and future employees and the carriers. The sums payable by the employees are to be percentages of their current compensation, and those by each carrier double the total payable by its employees. The Board is to determine from time to time what percentage is required to provide

[1] Act of June 27, 1934, c. 868, 48 Stat. 1283.
[2] U. S. C, Tit. 28, Sec. 347 (a).
[3] 293 U. S. 552.

the necessary funds, but until that body otherwise determines the employee contribution is to be 2% of compensation (Sec. 5). Out of this fund annuities are to be paid to beneficiaries.

The classes of persons eligible for such annuities are (1) employees of any carrier on the date of passage of the Act; (2) those who subsequently become employees of any carrier; (3) those who within one year prior to the date of enactment were in the service of any carrier (Sec. 1b.)

To every person in any of the three categories an annuity becomes payable: (a) when he reaches the age of 65 years, whether then in carrier service or not (Sec. 3); if still in such service he and his employer may agree that he shall remain for successive periods of one year until he attains 70, at which time he must retire (Sec. 4); (b) at the option of the employee, at any time between the ages of 51 and 65, if he has served a total of 30 years in the employ of one or more carriers, whether continuously or not (Secs. 3; 1f). The compulsory retirement provision is not applicable to those in official positions until five years after the effective date of the Act (Sec. 4).

The annuity is payable monthly (Sec. 1d). The amount is ascertained by multiplying the number of years of service, not exceeding 30, before as well as subsequent to the date the Act was adopted, whether for a single carrier or a number of carriers, and whether continuous or not, by graduated percentages of the employee's average monthly compensation (excluding all over $300). If one who has completed 30 years of service elects to retire before attaining the age of 65 years, the annuity is reduced by one-fifteenth for each year he lacks of that age, unless the retirement is due to physical or mental disability (Sec. 3).

Upon the death of an employee, before or after retirement, his estate is to be repaid all that he has contributed to the fund, with 3% interest compounded annually, less any annuity payments received by him (Sec. 3).

The Supreme Court of the District of Columbia declared the establishment of such a system within the competence of Congress; but thought several inseparable features of the Act transcended the legislative power to regulate interstate commerce, and required a holding that the law is unconstitutional in its entirety. Our duty, like that of the court below, is fairly to construe the powers of

Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation. The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to both public and private interest, if it be fairly within delegated power our obligation is to sustain it. On the other hand though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.

The admitted fact that many railroads have voluntarily adopted pension plans does not aid materially in determining the authority of Congress to compel conformance to the one embodied in the Railroad Retirement Act; nor does the establishment of compulsory retirement plans in European countries, to which petitioners refer, for in many of these railroads are operated under government ownership, and none has a constitutional system comparable to ours.

The federal government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people. The Constitution is not a statute, but the supreme law of the land to which all statutes must conform, and the powers conferred upon the federal government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle can not justify attempted exercise of a power clearly beyond the true purpose of the grant. All agree that the pertinent provision of the Constitution is Article I, Section 8, Clause 3, which confers power on the Congress "To regulate Commerce . . . among the several States . . ."; and that this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.[4]

The petitioners assert that the questioned Act, fairly considered, is a proper and necessary regulation of interstate commerce; its various provisions have reasonable relation to the main and con-

[4]See *Gibbons* v. *Ogden*, 9 Wheat. 1, 196-7; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *Lottery Case*, 188 U. S. 321, 362-3; *United States* v. *Chicago, M., St. P. & P. R. R. Co.*, 282 U. S. 311, 327.

trolling purposes of the enactment, the promotion of efficiency, economy and safety; consequently it falls within the power conferred by the commerce clause and does not offend the principle of due process. The respondents insist that numerous features of the Act contravene the due process guaranty and further that the requirement of pensions for employees of railroads is not a regulation of interstate commerce within the meaning of the Constitution. These conflicting views open two fields of inquiry which to some extent overlap.[5] If we assume that under the power to regulate commerce between the states Congress may require the carriers to make some provision for retiring and pensioning their employees, then the contention that various provisions of the Act are arbitrary and unreasonable and bear no proper relation to that end must be considered. If any are found which deprive the railroads of their property without due process, we must determine whether the remainder may nevertheless stand. Broadly the record presents the question whether a statutory requirement that retired employees shall be paid pensions is regulation of commerce between the states within Article I, Section 8.

1. We first consider the provisions affecting former employees. The Act makes eligible for pensions all who were in carrier service within one year prior to its passage, irrespective of any future reemployment. About 146,000 persons fall within this class, which, as found below, includes those who have been discharged for cause, who have been retired, who have resigned to take other gainful employment, who have been discharged because their positions were abolished, who were temporarily employed, or who left the service for other reasons. These persons were not in carrier service at the date of the Act, and it is certain thousands of them never again will be. The petitioners say the provision was inserted to assure those on furlough, or temporarily relieved from duty subject to call, the benefit of past years of service, in the event of reemploy-

[5] When the question is whether the Congress has properly exercised a granted power the inquiry is whether the means adopted bear any reasonable relation to the ostensible exertion of the power. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Hammer* v. *Dagenhart*, 247 U. S. 251, 276; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 37. When the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia* v. *New York*, 291 U. S. 502, 525.

ment, and to prevent the carriers from escaping their just obligations by omitting to recall these persons to service. And it is said that to attempt nicely to adjust the provisions of the Act to furloughed men would involve difficulties of interpretation and inequalities of operation which the blanket provision avoids. We cannot accept this view. It is arbitrary in the last degree to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or who have elected to pursue some other calling, or who have retired from the business, or have been for other reasons lawfully dismissed. And the claim that such largess will promote efficiency or safety in the future operation of the railroads is without support in reason or common sense.

In addition to the 146,000 who left the service during the year preceding the passage of the Act, over 1,000,000 persons have been but are not now in the employ of the carriers. The statute provides that if any of them is reemployed at any time, for any period, however brief, and in any capacity, his prior service with any carrier shall be reckoned in computing the annuity payable upon his attaining 65 years of age. Such a person may have been out of railroad work for years; his employment may have been terminated for cause; he may have elected to enter some other industry and may have devoted the best years of his life to it; yet if, perchance, some carrier in a distant part of the country should accept him for work of any description, even temporarily, the Act throws the burden of his pension on all the railroads, including, it may be, the very one which for just cause dismissed him. Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier. The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by

taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety. The petitioners say that one who is taken back into service will no doubt render more loyal service since he will know he is to receive a bonus for earlier work. But he will not attribute this benefaction to his employer. The argument comes merely to the contentment and satisfaction theory discussed elsewhere. The petitioners also argue that if the provision in question threatens an unreasonable burden, the carriers have in their own control the means of avoidance, since no carrier need employ any person who has heretofore been in the railroad business. The position is untenable for several reasons. A carrier may wish to employ one having experience, who has been in another's service. Must it forego the opportunity because to choose the servant will impose a financial obligation arising out of an earlier employment with some other railroad? Would that promote efficiency and safety? The testimony shows that 22 per cent. of all railway employees have had prior service on some railroad. Must a carrier at its peril exercise, through dozens of employment agencies scattered over a vast territory, an unheard of degree of care to exclude all former railroad workers at the risk of incurring the penalty of paying a pension for work long since performed for some other employer? So to hold would be highly unreasonable and arbitrary.

2. Several features of the Act, touching those now or hereafter in railroad employment, are especially challenged by the respondents.

No specified length of service is required for eligibility to pension, though the amount of the annuity is proportionately reduced if the total term of employment be less than 30 years. One may take a position with a carrier at twenty, remain until he is thirty, resign after gaining valuable skill and aptitude for his work, enter a more lucrative profession, and, though never thereafter in carrier employ, at 65 receive a pension calculated on his ten years of service. Or after ten years he may be discharged for peculation, and still be entitled to the gratuity. Or he may be relieved of duty for gross negligence, entailing loss of life or property, and yet collect his pension at 65. May these results be fairly denominated the indicia of reasonable regulation of commerce? May they be

cited in favor of this pension system as an aid to economy, efficiency or safety? We cannot so hold. The petitioners' explanation of this feature of the Act is that no "real assurance" of "old-age security" is possible "when pension rights may be lost at any time by loss of employment"; that such a provision is reasonable "because it improves the morale of the employees while they are in the service." Assurance of security it truly gives, but, quite as truly, if "morale" is intended to connote efficiency, loyalty and continuity of service, the surest way to destroy it in any privately owned business is to substitute legislative largess for private bounty and thus transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the legislature.

The Act assumes that, in fairness, both employer and employee should contribute in fixed proportions to a liberal pension. But we find that in contradiction of this recognized principle, thousands of those in the service at the date of the Act will at once become entitled to annuities, though they will have contributed nothing to the fund. The burden thus cast on the carriers is found to be for the first year of administration over $9,000,000, and until the termination of payments to these annuitants not less than $78,000,000. All that has been said of the irrelevance of the requirement of payments based upon services heretofore terminated to any consideration of efficiency or safety applies here with equal force. The petitioners say that the retention of these men will be injurious and costly to the service. This view assumes they will be retained for years and are incompetent to do what they are now doing. Evidence is lacking to support either supposition. Next it is said "that they will receive from the fund more than they will have contributed is not significant for all retired employees receive more than they contribute." This attempted but futile justification is significant of the fault in the feature sought to be supported.

One who has served a total of 30 years is entitled to retire on pension at his election, at whatever his then attained age. Thus many who are experienced and reliable may at their own election deprive a carrier of their services, enter another gainful occupation, cease to contribute to the fund, and go upon the pension roll years before the fixed retirement age of 65. The finding is that there are not less than 100,000 in the service of the carriers between 51 and 65 years of age who have had 30 or more years of service. The option is not extended to them to retire on pension in order to

improve transportation, for the choice is the employee's to be exercised solely on grounds personal to himself; and the provisions cannot promote economy, for the retiring worker's place will be filled by another who will receive the same wage. The court below properly found that "it is to the interest of the service of plaintiffs and is to the interest of the public that those of such employees who are competent and efficient be retained in carrier service for the benefit of their skill and experience." The petitioners say "clearly the provision in question is not arbitrary and unreasonable so as to be unlawful"; but in support of this statement they adduce only the following considerations. As the pension is reduced 1/15th for each year the annuitant lacks of 65 at the date of retirement, his separation, it is said, will impose no greater burden on the fund than if he had waited until 65; the reduction in the amount payable will discourage early retirement, and so tend to counteract the loss of skilled workers; and, finally, "the justification for this provision is that employees who have completed thirty years of service may find it necessary, and it may be in the interest of the industry, for them to retire before age 65." We search in vain for any assertion that the feature under discussion will promote economy, efficiency or safety, and the absence of any such claim is not surprising. The best that can be said, it seems, is that the burden incident to the privilege of early retirement will not be as heavy as others imposed by the statute.

On June 27, 1934, when the Act was approved, there were 1,164,707 people in carrier employ. The Act, by conferring a statutory right to a pension, based in part on past service, gave the work theretofore performed by these persons a new quality. Although completed and compensated in full in conformity with the agreement of the parties, that work, done over a period of 30 years past, is to be the basis for further compulsory payment. While, as petitioners point out, the bounties are payable only in the future, any continuance of the relation, however brief, subsequent to the passage of the Act, matures a right which reaches back to the date of original employment. And to the amount payable in virtue of all these prior years' service, the employees contribute nothing. It is no answer to say that from the effective date of the law they will have to contribute from their wages half as much as do their employers. The future accrues its own annuities. The finding, accepted by the petitioners as veracious, is that the annuities payable

for service performed prior to June 27, 1934, would in the year 1935 amount to $68,749,000, and would increase yearly until 1953, in which year the portion of the aggregate pension payments attributable to work antedating the passage of the Act would be $137,435,000. These figures apply only to pensions to those now employed and exclude payments to those who left the service during the year prior to the adoption of the Act, and to those former employees who may hereafter be reemployed.

This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation. The court below held the provision deprived the railroads of their property without due process, and we agree with that conclusion. Here again the petitioners insist that the requirement is appropriate, because, they say, it does not demand additional pay for past services, but expenditure "for a present and future benefit through improvement of the personnel of the carriers." But the argument ends with mere statement. Moreover, if it were correct in its assumption, which we shall presently show it is not, nevertheless there can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on a basis of cost with reference to which their rates were made and their fiscal affairs adjusted.

The Act defines as an employee entitled to its benefits an official or representative of an employee organization who during or following employment by a carrier acts for such an organization in behalf of employees. Such an one may retire and receive a pension provided in future he pays an amount equal to the sum of the contributions of an employee and of an employer. The petitioners say the burden thus imposed is not great; but the provision exhibits the same arbitrary and unreasonable features as those heretofore discussed, and seems irrelevant to any enhancement of safety or efficiency in transportation.

3. Certain general features of the system violate the Fifth Amendment. Under the statutory plan the draft upon the pension fund will be at a given rate, while the contributions of individual carriers to build up the fund will be at a disparate rate. This results from the underlying theory of the Act, which is that all the

railroads shall be treated as a single employer. The report of the Senate subcommittee announced:[6]

"It is agreed that all railroads which have been subjected to the jurisdiction of Congress are to be treated together as one employer. All persons in the service of the railroads are to be regarded as employees of the one employer. . . . The old age pension or annuity is to be based upon the wages and the length of service upon all railroads, with specified maximum limits."

The petitioners themselves showed at the trial that the probable age of entry into service of typical carriers differs materially; for one it is 28.4, for another 32.4, for a third 29.3, and for a fourth 34.2. Naturally the age of a pensioner at date of employment will affect the resultant burden upon the contributors to the fund. The statute requires that all employees of age 70 must retire immediately. It is found that 56 of the respondents have no employees in that class. Nevertheless they must contribute toward the pensions of such employees of other respondents nearly $4,000,000 the first year and nearly $33,000,000 in the total. The petitioners admit that these are the facts, but attempt to avoid their force by the assertion that "the cost differentials which are involved are negligible as compared with the total cost." This can only mean that in view of the enormous total cost to all the railroads, the group thus discriminated against should not complain of the disregard of their ownership of their own assets, because in comparison with gross cost the additional payments due to the inequality mentioned are small.

The evidence shows that some respondents are solvent and others not, a situation which often may recur. The petitioners concede that the plan is intended to furnish assurance of payment of pensions to employees of all the carriers, with the result that solvent railroads must furnish the money necessary to meet the demands of the system upon insolvent carriers, since the very purpose of the Act is that the pension fund itself shall be kept solvent and able to answer all the obligations placed upon it.

In recent years many carriers subject to the Interstate Commerce Act have gone out of existence. The petitioners admit that the employees of these defunct carriers are treated upon exactly the same basis as the servants of existing carriers. In other words, past service for a carrier no longer existing is to be added to any service hereafter rendered to an operating carrier, in computing a

[6] Cong. Rec., Vol. 78, p. 5699.

pension the whole burden of payment of which falls on those carriers still functioning. And all the future employees of any railroad which discontinues operation must be paid their pensions by the surviving roads. Again the answer of the petitioners is that the amount will be negligible. The fact that millions of dollars are involved in other features of the Act will not serve to obscure this violation of due process.

All the carriers must make good the contributions of all employees, for Section 3 directs that upon the death of an employee the Board shall pay him from the fund what he has contributed to it with 3 per cent. interest compounded annually, less any payments he has received. The railroads are not only liable for their own contributions, but are, in a measure, made insurers of those of the employees. This appears to be an unnecessarily harsh and arbitrary imposition, if the plan is to be what on its face it imports, a joint adventure with mutuality of obligation and benefit.

This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation.[7] The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees.

The petitioners insist that since the adoption of the Transportation Act, 1920, and as the logical consequence of decisions of this court, we must recognize that Congress may deal with railroad transportation as a whole and regulate the carriers generally and in classes, with an eye to improvement and development of railway service as a whole; that the interstate carriers use common facilities, make through rates, and interact amongst themselves in various ways, with the result that where any link in the chain lacks efficiency the system as a whole is affected. The argument is that since the railroads and the public have a common interest in the efficient performance of the whole transportation chain, it is proper and necessary to require all carriers to contribute to the cost of a plan

[7] *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 40, and cases cited.

designed to serve this end. It is said that the pooling principle is desirable because there are many small carriers whose employees are too few to justify maintenance of a separate retirement plan for each. And finally, the claim is that in fixing carrier contributions, any attempt to give consideration to difference in age, classification, and service periods of employees, would involve grave administrative difficulties and unduly increase the cost of administration. With these considerations in view the petitioners urge that our decisions sanction the exercise of the power involved in the pooling feature of the statute. They rely upon the *New England Divisions Case*, 261 U. S. 184. That case, however, dealt purely with rates; and while the policy of awarding a larger share of the division of a joint rate to the weaker carrier, in consideration of its need for revenue, was approved, the approval was definitely conditioned upon the circumstance that the share or division of the joint rate awarded to the stronger carrier was not so low as to require it to serve for an unreasonable rate. Thus the principle that Congress has no power to confiscate the property of one carrier for the benefit of another was fully recognized.

Dayton-Goose Creek Ry. Co. v. *United States*, 263 U. S. 456, approved the provision of the Transportation Act, 1920, which required the carriers to contribute "one-half of their excess earnings" to a revolving fund to be used by the Interstate Commerce Commission for making loans to carriers to meet capital expenditures and to refund maturing obligations, or to purchase equipment and facilities which might be leased to carriers. This case is relied upon as sustaining the principle underlying the pension act, but we think improperly. The provision was sustained upon the ground that it must be so administered as to leave to each carrier a reasonable return upon its property devoted to transportation, and the holding is clear that if this principle were not observed in administration, the Act would invade Constitutional rights.

Atlantic Coast Line Railroad Co. v. *Riverside Mills*, 219 U. S. 186, which the petitioners cite, is even wider of the mark. There this court upheld the Carmack Amendment, which made the initial carrier liable to the consignor for loss of goods contracted to be delivered over connecting lines. The legislation merely attached certain consequences to a given form of contract. It was recognized that initial carriers in fact enter into contracts for delivery of goods beyond their own lines and make through or joint rates

over independent lines. This being so, it was held a proper exercise of the power of regulation to require one so contracting to be liable in the first instance to the shipper. So to regulate a recognized form of contract is not offensive to the Fifth Amendment.

It is claimed that several other decisions confirm the legality of the pooling principle, when reasonably applied. For this position petitioners cite *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Noble State Bank* v. *Haskell*, 219 U. S. 104, and *Thornton* v. *Duffy*, 254 U. S. 361. In the first of these the Washington workmen's compensation act, which required employers in extra-hazardous employment, to pay into a state fund certain premiums based upon the percentage of estimated pay roll of the workmen employed, was under attack. For the purpose of payments into the fund accounts were to be kept with each industry in accordance with a statutory classification, and it was definitely provided that no class should be liable for the depletion of the accident fund by reason of accidents happening in any other class. The act therefore clearly recognized the difference in drain or burden on the fund arising from different industries and sought to equate the burden in accordance with the risk. The challenge of the employers was that the statute failed of equitable apportionment as between the constituted classes. But no proof was furnished to that effect, and this court assumed that the classification was made in an effort at fairness and equity as between classes. The Railroad Retirement Act, on the contrary, makes no classification, but, as above said, treats all the carriers as a single employer, irrespective of their several conditions.

In the second case this court upheld a statute which required state banks to contribute a uniform percentage of their deposits to a state guaranty fund established for the purpose of making good losses to the depositors of banks which might become insolvent. The act was sustained upon the principle that an ulterior public advantage may justify the taking of a comparatively insignificant amount of private property for what in its immediate purpose is a private use. It was further said that there may be cases other than those of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden which it is compelled to assume. These considerations clearly distinguish that case from the one now under discussion.

In the case last cited it was asserted that the workmen's compensation act of Ohio unfairly discriminated because it allowed employers in certain cases to pay directly to workmen or their dependents the compensation provided by law, in lieu of contributing to the state fund established to secure such payments. This court held that the classification did not amount to a denial of due process.

We conclude that the provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process.

The Act is said to be unconstitutional because unreasonably and unconscionably burdensome and oppressive upon the respondents, and we are referred to a finding of the court below to which petitioners do not assign error. The facts as found are: based upon present payrolls, the carriers' contributions for the first year will aggregate not less than $60,000,000; at the rates fixed in the Act, total employee and carrier contributions will, on the basis of present payrolls, be approximately $90,000,000 per year; unless the amount of the contributions is increased by the Board, the drain on the fund for payment of pensions will result in a deficit of over $11,000,000 by the year 1942. To keep the fund in operation it will be necessary for the Board to increase the percentages of contributions named in the Act. The petitioners' actuary testified that in the tenth year of operation the payments from the fund will be upwards of $137,000,000. The railroads' total contribution to pensions on account of prior service of employees in service at the date of the Act may amount to $2,943,966,000. We are not prepared to hold that if the law were in other respects within the legislative competence, the enormous cost involved in its administration would invalidate it; but the recited facts at least emphasize the burdensome and perhaps destructive effect of the contraventions of the due process of law clause which we find exist. Moreover they exhibit the inconsistency of the petitioners' position that the law is necessary because in times of depression the voluntary systems of the carriers are threatened by loss of revenue. It is difficult to perceive how the vast increase in pension expense entailed by the statute will, without provision of additional revenue, relieve the

difficulty experienced by some railroads in meeting the demands of the plans now in force.

4. What has been said sufficiently indicates our agreement with the holding of the trial court respecting the disregard of due process exhibited by a number of the provisions of the Act. We also concur in that court's views concerning the inseverability of certain of them. The statute contains a section broadly declaring the intent that invalid provisions shall not operate to destroy the law as a whole.[a] Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command. *Dorchy* v. *Kansas*, 264 U. S. 286. It has the effect of reversing the presumption which would otherwise be indulged, of an intent that unless the act operates as an entirety it shall be wholly ineffective. *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184. But notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole. Compare *Hill* v. *Wallace*, 259 U. S. 44, 70. In this view we are confirmed by the petitioners' argument that as to some of the features we hold unenforcible, it is "unthinkable" and "impossible" that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them.

5. It results from what has now been said that the Act is invalid because several of its inseparable provisions contravene the due process of law clause of the Fifth Amendment. We are of opinion that it is also bad for another reason which goes to the heart of the law, even if it could survive the loss of the unconstitutional features which we have discussed. The Act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution.

Several purposes are expressed in Section 2 (a), amongst them: to provide "adequately for the satisfactory retirement of aged employees"; "to make possible greater employment opportunity and more rapid advancement;" to provide by the administration and construction of the Act "the greatest practicable amount of relief

[a]Sec. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees." The respondents assert and the petitioners admit that though these may in and of themselves be laudable objects, they have no reasonable relation to the business of interstate transportation. The clause, however, states a further purpose, the promotion of "efficiency and safety in interstate transportation," and the respondents concede that an act, the provisions of which show that it actually is directed to the attainment of such a purpose, falls within the regulatory power conferred upon the Congress; but they contend that here the provisions of the statute emphasize the necessary conclusion that the plan is conceived solely for the promotion of the stated purposes other than efficient and safe operation of the railroads. The petitioners' view is that this is the true and only purpose of the enactment, and the other objects stated are collateral to it and may be disregarded if the law is found apt for the promotion of this legitimate purpose.

From what has already been said with respect to sundry features of the statutory scheme, it must be evident that petitioners' view is that safety and efficiency are promoted by two claimed results of the plan: the abolition of excessive superannuation, and the improvement of morale.

The parties are at odds respecting the existing superannuation of railway employees. Petitioners say it is much greater than that found in the heavy industries. Respondents assert it is less, and the court below so found. The finding is challenged as being contrary to the evidence. We may, for present purposes, assume that "superannuation" as petitioners use the term, i. e., the attainment of 65 years, is as great or greater in the railroad industry than in comparable employments. It does not follow, as contended, that the man of that age is inefficient or incompetent. The facts indicate a contrary conclusion. Petitioners say the seniority rules and the laying off of younger men first in reducing forces, necessarily tend to keep an undue proportion of older men in the service. They say this tendency has long been marked in the railroad industry and has been most noticeable in recent years of depression when forces have been greatly reduced. But what are the uncontradicted facts as to efficiency and safety of operation? Incontrovertible statistics obtained from the records of the Interstate Commerce Commission show a steady increase in safety of

operation, during this period of alleged increasing superannuation.[9]

[9]Tables included in the record are as follows:

Year:

1905, 1	passenger	killed	for	each	1,376,000	carried.
1910, 1	"	"	"	"	3,060,000	"
1915, 1	"	"	"	"	4,954,000	"
1920, 1	"	"	"	"	5,673,000	"
1925, 1	"	"	"	"	5,237,000	"
1930, 1	"	"	"	"	11,658,000	"
1932, 1	"	"	"	"	17,921,000	"

Decrease in frequency, 77%.

Year	Total Frt. Pasgr. and Motor Train Miles (Thousands)	Total Train Accidents	Frequency Per Million Train Miles
1923	1,207,714	27,497	22.77
1924	1,171,812	22,368	19.09
1925	1,187,731	20,785	17.50
1926	1,211,617	21,077	17.39
1927	1,184,456	18,976	16.02
1928	1,169,442	16,949	14.49
1929	1,178,585	17,185	14.58
1930	1,082,306	12,313	11.38
1931	951,220	8,052	8.46
1932	813,091	5,770	7.09

Decrease in frequency, 69%.

Year	Total man-hours worked by all employees (thousands)	Total employees killed and injured			Total casualty rate all employes per million man-hours
		Killed	Injured	Total	
1923	4,856,964	1,866	148,146	150,012	30.89
1924	4,473,186	1,403	120,912	122,315	27.34
1925	4,448,377	1,460	114,639	116,099	26.10
1926	4,557,537	1,528	107,218	108,746	23.86
1927	4,406,627	1,427	83,883	85,310	19.36
1928	4,191,065	1,187	66,744	67,931	16.21
1929	4,225,292	1,302	57,164	58,466	13.84
1930	3,641,412	898	33,184	34,082	9.36
1931	2,930,657	621	21,417	22,038	7.52
1932	2,286,561	532	16,359	16,891	7.39

Decrease in frequency, 76%.

Year	Man-hours worked by Trainmen (Thousands)	Number Trainmen Killed	Number Trainmen Injured	Total Trainmen's Casualties	Total Casualty Rate Per Million Man-hours
1923	915,084	896	35,342	36,238	39.60
1924	829,533	628	28,438	29,066	35.04
1925	831,682	691	28,297	28,989	34.86
1926	858,598	691	29,864	30,555	35.59
1927	812,853	639	24,462	25,101	30.88
1928	776,184	501	20,943	21,444	27.63
1929	785,504	587	19,116	19,703	24.96
1930	673,208	423	11,771	12,194	18.11
1931	546,277	292	8,259	8,551	15.65
1932	431,083	265	6,318	6,583	15.27

Decrease in frequency, 61%.

Indeed, one of the petitioners, and one of their most important witnesses, has written, referring to railroads:

"Experience seems to have proved, moreover, that older workers cause fewer accidents than do younger; hence there is little necessity for removing them on that ground."[10]

There is overwhelming evidence in the record to the same effect. All that petitioners offer on the subject in their brief is: "in an industry having as many hazardous occupations as the railway industry, improvement in personnel conditions is likely to mean increased safety." We think it not unfair to say that the claim for promotion of safety is virtually abandoned.

How stands the case for efficiency? Here again the record without contradiction demonstrates that in step with the alleged progressive superannuation on the railroads their operations have increased in efficiency.[11] The trial court found, and its finding is not assigned as error: "Railroads were, when the Act was enacted, and are now, operated efficiently and safely and more efficiently and much more safely than at any time in history."

Lastly the petitioners suggest that diminution of superannuation promotes economy, because younger and lower paid men will replace the retired older men. But the argument is based upon inadvertent disregard of the wage structure of the carriers, especially in the train and engine service, whereby contract compensation is based not on age but upon the nature of the duties performed. The replacement of one by another who is to do the same work will therefore beget no saving in wages.

When to these considerations is added that, as heretofore said, the Act disregards fitness to work, pensions the worker who retires at his option before any suggested superannuation, irrespective of skill or ability, pensions those who are presently compelled by the law to retire, irrespective of their fitness to labor, and grants annuities to those who are discharged for dishonesty or gross care-

[10] Latimer, Industrial Pension Systems, Vol. II, 724.

[11] Thus it appears that the average speed of freight trains between terminals in 1923 was 10.9 miles per hour, in 1929 was 13.2 miles per hour, and in 1933 was 15.7 miles per hour. Excluding weight of locomotive and tender each freight train hour in 1923 produced 16,764 gross ton-miles; in 1929 produced 24,539 gross ton-miles; and in 1933 produced 27,343 gross ton-miles; and net ton-miles per freight train hour increased 41.2 per cent. from 1923 to 1933, and 3.7 per cent. from 1929 to 1933. Cost of transportation is also shown to have decreased in the same periods.

lessness, it becomes perfectly clear that, though the plan may bring about the social benefits mentioned in Section 2a, it has and can have no relation to the promotion of efficiency, economy or safety by separating the unfit from the industry. If these ends demand the elimination of aged employees, their retirement from the service would suffice to accomplish the object. For these purposes the prescription of a pension for those dropped from service is wholly irrelevant. The petitioners, conscious of the truth of this statement, endeavor to avoid its force by the argument that social and humanitarian considerations demand the support of the retired employee. They assert that it would be unthinkable to retire a man without pension and add that attempted separation of retirement and pensions is unreal in any practical sense, since it would be impossible to require carriers to cast old workers aside without means of support. The supposed impossibility arises from a failure to distinguish Constitutional power from social desirability. The relation of retirement to safety and efficiency is distinct from the relation of a pension to the same ends, and the two relationships are not to be confused.

In final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale, and morale in turn upon assurance of security for the worker's old age. Thus pensions are sought to be related to efficiency of transportation, and brought within the commerce power. In supporting the Act the petitioners constantly recur to such phrases as "old age security", "assurance of old age security", "improvement of employee morale and efficiency through providing definite assurance of old age security", "assurance of old age support", "mind at ease", and "fear of old age dependency." These expressions are frequently connected with assertions that the removal of the fear of old age dependency will tend to create a better morale throughout the ranks of employees. The theory is that one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently. The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of

his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement.

No support for a plan which pensions those who have retired from the service of the railroads can be drawn from the decisions of this court sustaining measures touching the relations of employer and employee in the carrier field in the interest of a more efficient system of transportation. The Safety Appliance Acts, the Employers' Liability Acts, hours-of-service laws, and others of analogous character, cited in support of this Act, have a direct and intimate connection with the actual operation of the railroads. No less inapposite are the statutes which deal with exchange of facilities, joint facilities, joint rates, etc. For these have an obvious and direct bearing on the obligations of public service incident to the calling of the railroads. The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation. It was pointed out that the act did not interfere with the normal right of the carrier to select its employees or discharge them. *Texas & New Orleans R. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 570-1. The legislation considered in *Wilson* v. *New*, 243 U. S. 332, was drafted to meet a particular exigency and its validity depended upon circumstances so unusual that this court's decision respecting it cannot be considered a precedent here.

Stress is laid upon the supposed analogy between workmen's compensation laws and the challenged statute. It is said that while Congress has not adopted a compulsory and exclusive system of workmen's compensation applicable to interstate carriers, no one doubts the power so to do; and the Retirement Act cannot in principle be distinguished. The contention overlooks fundamental differences. Every carrier owes to its employees certain duties the disregard of which render it liable at common law in an action sounding in tort. Each state has developed or adopted, as part of its jurisprudence, rules as to the employer's liability in particular circumstances. These are not the same in all the states. In the absence of a rule applicable to all engaged in interstate transportation the right of recovery for injury or death of an employee may vary depending upon the applicable state law. That Congress may, under the commerce power, prescribe an uniform rule of liability and a remedy uniformly available to all those so engaged, is not open to doubt. The considerations upon which we have sustained compulsory workmen's compensation laws passed by the states in the sphere where their jurisdiction is exclusive apply with equal force in any sphere wherein Congress has been granted paramount authority. Such authority it may assert whenever its exercise is appropriate to the purpose of the grant. A case in point is the Longshoremen's and Harbor Workers' Compensation Act, passed pursuant to the delegation of admiralty jurisdiction to the United States. Modern industry, and this is particularly true of railroads, involves instrumentalities, tasks and dangers unknown when the doctrines of the common law as to negligence were developing. The resultant injuries to employees, impossible of prevention by the utmost care, may well demand new and different redress ~~than~~ from that afforded in the past. In dealing with the situation it is permissible to substitute a new remedy for the common law right of action; to deprive the employer of common law defenses and substitute a fixed and reasonable compensation commuted to the degree of injury; to replace uncertainty and protracted litigation with certainty and celerity of payment; to eliminate waste; and to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems. By the very certainty that compensation must be paid for every injury such legislation promotes and encourages precaution on the part of the employer

against accident and tends to make transportation safer and more efficient. The power to prescribe an uniform rule for the transportation industry throughout the country justifies the modification of common law rules by the Safety Appliance Acts and the Employers' Liability Acts applicable to interstate carriers, and would serve to sustain compensation acts of a broader scope like those in force in many states. The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional. It is beside the point that compensation would have to be paid despite the fact that the carrier has performed its contract with its employee and has paid the agreed wages. Liability in tort is imposed without regard to such considerations; and in view of the risks of modern industry the substituted liability for compensation likewise disregards them. Workmen's compensation laws deal with existing rights and liabilities by readjusting old benefits and burdens incident to the relation of employer and employee. Before their adoption the employer was bound to provide a fund to answer the lawful claims of his employees; the change is merely in the required disbursement of that fund in consequence of the recognition that the industry should compensate for injuries occurring with or without fault. The act with which we are concerned seeks to attach to the relation of employer and employee a new incident, without reference to any existing obligation or legal liability, solely in the interest of the employee, with no regard to the conduct of the business, or its safety or efficiency, but purely for social ends.

The petitioners, in support of their argument as to morale, rely upon the voluntary systems adopted in past years by almost all the carriers, and now in operation. The argument runs that these voluntary plans were adopted in the industry for two principal reasons—the creation of loyalty and the encouragement of continuity in service. The petitioners quote from a statement by the National Industrial Conference Board the following:

"More specifically, the efficiency of the individual workers is stimulated by the feeling of security and hopefulness that results when the individual is relieved of the fear of destitution and dependency in old age and by the sentiment of loyalty and good will fostered by the pension plan, which thus operates as a spur to the

ambition of the worker and incites him to more intensive and sustained effort. Similarly the efficiency of the organization as a whole is increased by the improvement of industrial relations, the development of a cooperative spirit, and the promotion of constancy and continuity of employment."

They assert that the Railroad Retirement Act, "although it embodies the first compulsory retirement and pension plan enacted in this country, is but the development of voluntary plans which have been in use in this country, particularly among the railroads, for more than a third of a century." The argument is self-contradictory. If, as is conceded, the purpose of the voluntary establishment of pensions is to create loyalty to the employer who establishes them, and continuity in his service, it seems axiomatic that the removal of the voluntary character of the pension and the imposition of it in such form as Congress may determine, upon all employers, and irrespective of length of service, or of service for the same employer, will eliminate all sense of loyalty or gratitude to the employer, and remove every incentive to continuance in the service of a single carrier. In fact the petitioners so admit, for they say in their brief:

"That the benefits which respondents expected to derive from their voluntary pension plans (said to be (1) greater continuity of service and (2) improved employee loyalty) differ from those emphasized in the Retirement Act does not affect the Act's validity, so long as it is calculated in other ways to promote efficiency and safety."

We are left to surmise what these "other ways" may be unless they are the contentment and assurance of security so much stressed in the argument. The petitioners, *in effect*, say: the carriers with certain objects and purposes have adopted voluntary systems; this proves that pensions are germane to the railroad business; Congress may legislate on any subject germane to interstate transportation; therefore Congress may for any reason or with any motive impose any type of pension plan. The contention comes very near to this,—that whatever some carriers choose to do voluntarily in the management of their business, at once invests Congress with the power to compel all carriers to do. The fallacy is obvious. The meaning of the commerce and due process clauses of the Constitution is not so easily enlarged by the voluntary acts of individuals or corporations.

Counsel for the petitioners admit that "it may well be" voluntary plans are intended to promote efficiency and safety by "inducing loyalty and continuity", and "it could also be true that these means were ignored in the Retirement Act." They add:

"Congress has deliberately chosen the means of providing old age security for all railroad employees, measured by years of service, but not dependent upon continuity of service with any particular carrier, as is required under the existing railway pension systems. If it were true, as claimed, that the Act will not encourage continuity of service and will remove the incentives for employee loyalty to employer, it has other virtues, as has been indicated; for example, it provides greater assurance to employees of old age security than has been the case under the carriers' pension plans, and is likely to be productive of efficiency through improvement of employee morale."

Certainly the argument is inconsistent with any thought that a plan imposed by statute, requiring the payment of a pension, will promote the same loyalty and continuity of service which were the ends and objects of the voluntary plans. It is going far to say, as petitioners do, that Congress chose the more progressive method "already tried in the laboratory of industrial experience", which they claim has been approved and recommended by those qualified to speak. In support of the assertion, however, they cite general works dealing with voluntary pension plans, and not with any such compulsory system as that with which we are concerned. We think it cannot be denied, and, indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the Act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither necessary nor an appropriate rule or regulation affecting the due fulfilment of the railroads' duty to serve the public in interstate transportation.

The judgment of the Supreme Court of the District of Columbia is

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 566.—October Term, 1934.

Railroad Retirement Board, et al. Petitioners, *vs.* The Alton Railroad Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[May 6, 1935.]

The Chief Justice, dissenting.

I am unable to concur in the decision of this case. The gravest aspect of the decision is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act, but denies to Congress the power to pass any compulsory pension act for railroad employees. If the opinion were limited to the particular provisions of the Act, which the majority find to be objectionable and not severable, the Congress would be free to overcome the objections by a new statute. Classes of persons held to be improperly brought within the range of the Act could be eliminated. Criticisms of the basis of payments, of the conditions prescribed for the receipt of benefits, and of the requirements of contributions, could be met. Even in place of a unitary retirement system another sort of plan could be worked out. What was thus found to be inconsistent with the requirements of due process could be excised and other provisions substituted. But after discussing these matters, the majority finally raise a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of the congressional authority to regulate interstate commerce. In that view, no matter how suitably limited a pension act for railroad employees might be with respect to the persons to be benefited, or how appropriate the measure of retirement allowances, or how sound actuarily the plan, or how well adjusted the burden, still under this decision Congress would not be at liberty to enact such a measure. That is a conclusion of such serious and far-reaching importance that it overshadows all other questions raised by the Act. Indeed, it makes their discussion superfluous. The final objection goes, as the opinion states, "to the heart of the law, even if it could survive the loss of the unconstitutional features" which the opinion per-

ceives. I think that the conclusion thus reached is a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution.

First. In defining the power vested in Congress to regulate interstate commerce, we invariably refer to the classic statement of Chief Justice Marshall. It is the power "to prescribe the rule by which commerce is to be governed". The power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution". *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. It is a power to enact "all appropriate legislation for the protection and advancement" of interstate commerce. *The Daniel Ball*, 10 Wall. 557, 564. "To regulate", we said in the *Second Employers Liability Cases*, 223 U. S. 1, 47, "in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large". And the exercise of the power, thus broadly defined, has had the widest range in dealing with railroads, which are engaged as common carriers in interstate transportation. As their service is vital to the nation, nothing which has a real or substantial relation to the suitable maintenance of that service, or to the discharge of the responsibilities which inhere in it, can be regarded as beyond the power of regulation. *The Shreveport Case*, 234 U. S. 342, 351; *Dayton-Goose Creek Railway Co.* v. *United States*, 263 U. S. 456, 478; *Colorado* v. *United States*, 271 U. S. 153, 163, 164; *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24, 25.

It was inevitable that, with the development of the transportation system of the country, requiring a vast number of employees, there should have been a growing appreciation of the importance of conditions of employment. It could not be denied that the sovereign power to govern interstate carriers extends to the regulation of their relations with their employees who likewise are engaged in interstate commerce. The scope of this sort of regulation has been extensive. There has been not only the paramount consideration of safety, but also the recognition of the fact that fair treatment in other respects aids in conserving the peace and good order which are essential to the maintenance of the service without disastrous interruptions, and in promoting the efficiency which inevitably suffers from a failure to meet the reasonable demands of justice. An absolute duty to furnish safety appliances

has been imposed, restrictions of hours of continuous service have been prescribed, standards of a day's work have been established for work and wages, the liability of carriers for injuries to employees has been regulated by the abrogation of the fellow servant rule and the limitation of defenses as to contributory negligence and assumption of risk, and provisions have been enacted to facilitate the amicable settlement of disputes and to protect employees in their freedom to organize for the purpose of safeguarding their interests. *St. Louis & Iron Mountain Railway Co.* v. *Taylor*, 210 U. S. 281; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Wilson* v. *New*, 243 U. S. 332; *Texas & New Orleans R. R. Co.* v. *Railway Clerks*, 281 U. S. 548.

The argument that a pension measure, however sound and reasonable as such, is *per se* outside the pale of the regulation of interstate carriers, because such a plan could not possibly have a reasonable relation to the ends which Congress is entitled to serve, is largely answered by the practice of the carriers themselves. Following precedents long established in Europe, certain railroad companies in the United States set up voluntary pension systems many years ago. It appears that the first of these was established in 1884, another was adopted in 1900. By 1910, formal pension plans covered 50 per rent of all railroad employees, and, by 1927, over 82 per cent. In establishing these plans the carriers were not contemplating the payment of a largess unrelated to legitimate transportation ends. Their witnesses say the carriers aimed at loyalty and continuity of service. However limited their motives, they acted upon business principles. Pension plans were not deemed to be essentially foreign to the proper conduct of their enterprises. But if retirement or pension plans are not *per se* unrelated to the government of transportation operations, Congress could consider such plans, examine their utility, and reach its own conclusions. If the subject matter was open to consideration, Congress was not limited to the particular motives which inspired the plans of the carriers.

The Government stresses the importance of facilitating the retirement of superannuated employees. The argument points to the conclusions of expert students as given in the testimony below, and to the reports of investigating committees and boards of leading business organizations. "*Employees' Retirement Annuities*", Chamber of Commerce of the United States, 1932, pp. 7, 8; "*Ele-*

ments of Industrial Pension Plans", National Industrial Conference Board, 1931, pp. 8, 10. Mr. Eastman, the Federal Coordinator of Transportation, in his affidavit on the hearing below, expressed the view that there was excessive superannuation among railroad employees. He says: "This excessive superannuation is detrimental to railroad service in several ways. Men who have grown old in the service decline in efficiency. The carrier pays in wages an amount out of proportion to the service rendered. These conditions exist upon the railroads at the present time. There is now a large body of superannuated employees in the railroad service who, for the good of the service, ought to be retired. Pension systems, of one sort or another, have been in existence in the railroad industry for as long as 50 years. The need for them was recognized by the more progressive carriers at an early date. In late years, particularly, with the voluntary systems in danger, the matter of retirement and pensions has been a crucial issue in railroad employment. Withdrawal or extensive curtailment of existing pensions in the railroad industry would impair the morale of railroad employees and play havoc with railroad labor relations. It would, in addition, increase the existing excessive superannuation among railroad employees and block the employment and promotion of younger men".

The carriers deny that there is excessive superannuation. They assert that the removal of older employees has no reasonable relation to either safety or efficiency. The opinion of the Court enters this field of controversy, reviews statistics as to the increase of safety and efficiency in operation during the period of the alleged increasing superannuation, and supports the finding that railroads are now operated more efficiently and safely than at any time in history. But that gratifying fact does not establish that further improvement is not needed or obtainable, or that a sound pension plan would not be of considerable benefit to the carriers' operations. At best, the question as to the extent of superannuation, and its effect, is a debatable one, and hence one upon which Congress was entitled to form a legislative judgment. As we said in *Radice* v. *New York*, 264 U. S. 292, 294: "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not

permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker". See *Stephenson* v. *Binford*, 287 U. S. 251, 272.

Laying that question on one side, I think that it is clear that the morale of railroad employees has an important bearing upon the efficiency of the transportation service, and that a reasonable pension plan by its assurance of security is an appropriate means to that end. Nor should such a plan be removed from the reach of constitutional power by classing it with a variety of conceivable benefits which have no such close and substantial relation to the terms and conditions of employment. The appropriate relation of the exercise of constitutional power to the legitimate objects of that power is always a subject of judicial scrutiny. With approximately 82 per cent of railroad employees, 90 per cent of those employed in cable, telephone and telegraph companies, and about one-half of those in the service of electric railways, light, heat and power companies under formal pension plans,[1] with the extensive recognition by national, state and local governments of the benefit of retirement and pension systems for public employees in the interest of both efficiency and economy,[2] it is evident that there is a widespread conviction that the assurance of security through a pension plan for retired employees is closely and substantially related to the proper conduct of business enterprises.

But with respect to the carriers' plans, we are told that as they were framed in the desire to promote loyalty and continuity of service in the employment of particular carriers, the accruing advantages were due to the fact that the plans were of a voluntary character. In short, that the reaction of the employees would be simply one of gratitude for an act of grace. I find no adequate basis for a conclusion that the advantages of a pension plan can be only such as the carriers contemplated or that the benefit which may accrue to the service from a sense of security on the part of employees should be disregarded. In that aspect, it would be the fact that protection was assured, and not the motive in supplying it, which would produce the desired result. That benefit would not be lost because the sense of security was fostered by a pension plan enforced as an act of justice. Indeed, voluntary plans may have the defect of being voluntary, of being subject to curtailment or withdrawal at will. And the danger of such curtailment or

[1] Latimer, "Industrial Pension Plans," 1932, Vol. I, p. 55.
[2] "Public Service Retirement Systems," Bureau of Labor Statistics (U. S.) Bulletin No. 477, 1929.

abandonment, with the consequent frustration of the hopes of a vast number of railroad workers and its effect upon labor relations in this enterprise of outstanding national importance, might well be considered as an additional reason for the adoption of a compulsory plan. *Wilson* v. *New, supra*, pp. 347, 348. There was also testimony (by Mr. Eastman) that "the experience with the voluntary pension systems has been unsatisfactory", that "the depression brought clearly to light their many weaknesses and uncertainties".

The argument in relation to voluntary plans discloses the fundamental contention on the question of constitutional authority. In substance, it is that the relation of the carriers and their employees is the subject of contract; that the contract prescribes the work and the compensation; and that a compulsory pension plan is an attempt for social ends to impose upon the relation non-contractual incidents in order to insure to employees protection in their old age. And this is said to lie outside the power of Congress in the government of interstate commerce. Congress may, indeed, it seems to be assumed, compel the elimination of aged employees. A retirement act for that purpose might be passed. But not a pension act. The government's power is conceived to be limited to a requirement that the railroads dismiss their superannuated employees, throwing them out helpless, without any reasonable provision for their protection.

The argument pays insufficient attention to the responsibilities which inhere in the carriers' enterprise. Those responsibilities, growing out of their relation to their employees, cannot be regarded as confined to the contractual engagement. The range of existing federal regulation of interstate carriers affords many illustrations of the imposition upon the employer-employee relation of non-contractual incidents for social ends. A close analogy to the provision of a pension plan is suggested by the familiar examples of compensation acts. The power of Congress to pass a compensation act to govern interstate carriers and their employees engaged in interstate commerce does not seem to be questioned. The carriers might thus be compelled to provide appropriate compensation for injuries or death of employees, although caused without fault on the carriers' part. A thorough examination of the question of constitutional authority to adopt such a compulsory measure was made some years ago by a commission constituted under a

Joint Resolution of Congress, of which Senator Sutherland (now Mr. Justice Sutherland) was chairman.[3] 36 Stat. 884. Its elaborate and unanimous report, transmitted to Congress by President Taft with his complete approval, considered the constitutional question in all aspects, upheld the congressional power, and proposed its exercise. Sen. Doc. No. 338, 62d Cong. 2d sess. Among the principles announced was that "If the proposed legislation effectuates any constitutional power, it is not rendered unconstitutional because to a greater or less extent it may accomplish or tend to accomplish some other result which, as a separate and independent matter, would be wholly beyond the power of Congress to deal with". *Id.*, p. 26. The legislation was deemed to be a regulation of interstate commerce because, among other specified things, of its effect on the state of mind of the employee. On this point the commission said: "By insuring to every employee engaged in interstate commerce definite compensation in case of his injury, and to his widow and children, or other dependents, in case of his death, irrespective of fault, the mind of the employee will, to a great extent, be relieved from anxiety for the future and he will be able to render better and more efficient, and consequently safer, service". *Id.*, p. 28. The commission explicitly pointed out that the legislation which it recommended was not based on any wrong or neglect of the carrier, "but upon the *fact* of injury resulting from accident in the course of the employment", that is, that accidents should be regarded "as risks of the industry". *Id.*, p. 15. The circumstance that such a compensation measure has not been enacted by Congress is readily attributable to questions of policy rather than to any doubt of constitutional power.

The effort to dispose of the analogy serves only to make it the more impressive. Compensation acts are said to be a response to the demands which inhere in the development of industry, requiring new measures for the protection of employees. But pension measures are a similar response. If Congress may supply a uniform rule in the one case, why not in the other? If affording certainty of protection is deemed to be an aid to efficiency, why should that consideration be ruled out with respect to retirement allowances and be admitted to support compensation allowances

[3]The members of the commission were Senators George Sutherland and George E. Chamberlain, Representatives William G. Brantley and Reuben O. Moon, William C. Brown, president of the New York Central lines, and D. L. Cease, the editor of The Railroad Trainman.

for accidents which happen in the absence of fault? Compensation acts do not simply readjust old burdens and benefits. They add new ones, outside and beyond former burdens and benefits, and thus in truth add a new incident to the relation of employer and employee.

When we go to the heart of the subject, we find that compensation and pension measures for employees rest upon similar basic considerations. In the case of compensation acts, the carrier has performed its contract with the employee, has paid the agreed wages, has done its best to protect the employee from injury, is guilty of no neglect, but yet is made liable for compensation for injury or for death which ends the possibility of future service, because in the development of modern enterprises, in which accidents are inevitable, it has come to be recognized that the industry itself should bear its attendant risks. *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Company* v. *Washington*, 243 U. S. 219. An attempted distinction as to pension measures for employees retired by reason of age, because old age is not in itself a consequence of employment, is but superficial. The common judgment takes note of the fact that the retirement of workers by reason of incapacity due to advancing years is an incident of employment and that a fair consideration of their plight justifies retirement allowances as a feature of the service to which they have long been devoted. This is recognized as especially fitting in the case of large industrial enterprises, and of municipal undertakings such as police and fire protection, where there are stable conditions of employment in which workers normally continue so long as they are able to give service and should be retired when efficiency is impaired by age. What sound distinction, from a constitutional standpoint, is there between compelling reasonable compensation for those injured without any fault of the employer, and requiring a fair allowance for those who practically give their lives to the service and are incapacitated by the wear and tear of time, the attrition of the years? I perceive no constitutional ground upon which the one can be upheld and the other condemned.

The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction

based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable.

Second. With this opinion as to the validity of a pension measure if it is reasonably conceived, we are brought to the question of due process, whether the particular provisions of the retirement act now before us violate the requirement of due process which, under the Fifth Amendment, limits the exercise of the commerce power.

The most serious of the objections, sustained by the Court on this score, relates to the establishment of a unitary or pooling system for all railroads. It is said that in this respect the plan disregards the private and separate ownership of the respective carriers, treating them as a single employer, and illustrations are given to show that unequal burdens are thus imposed.

The objection encounters previous decisions of this Court. We have sustained a unitary or group system under state compensation acts against the argument under the due process clause of the Fourteenth Amendment. *Mountain Timber Company* v. *Washington, supra.* The Washington compensation act established a state fund for the compensation of workmen injured in hazardous employment, and the fund was maintained by compulsory contributions from employers in such industries. While classes of industries were established, each class was made liable for the accidents occurring in that class. The Court described the law as so operating that "the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors". *Id.*, pp. 236, 237. The statute was sustained in the view that its provisions did not rest upon the wrong or neglect of employers, but upon the responsibility which was deemed to attach to those who conducted such industries. The Court concluded "that the State acted within its power in declaring that no employer should conduct such an industry without

making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur." *Id.*, p. 244. We followed the reasoning which had led to the upholding of state laws imposing assessments on state banks generally in order to create a guaranty fund to make good the losses of deposits in insolvent banks. *Noble State Bank* v. *Haskell*, 219 U. S. 104. See *Abie State Bank* v. *Bryan*, 282 U. S. 765.

But, aside from these analogies, this Court has directly sustained the grouping of railroads for the purpose of regulation in enforcing a common policy deemed to be essential to an adequate national system of transportation, even though it resulted in taking earnings of a strong road to help a weak one. This was the effect of the recapture clause of Transportation Act, 1920, which required carriers to contribute their earnings in excess of a certain amount in order to provide a fund to be used by the Interstate Commerce Commission in making loans to other carriers. *Dayton-Goose Creek Railway Co.* v. *United States*, 263 U. S. 456. A distinction is sought to be made because the carriers, which were required to contribute, were permitted to retain a reasonable return upon their property. But what the strong roads were compelled to contribute were their own earnings resulting from just and reasonable rates,—earnings which they were as clearly entitled to retain for their own benefit as the moneys which in the present instance are to be devoted to retirement allowances. The fact that the recapture provisions failed of their purpose and have been abandoned does not disturb the decision as to constitutional power. The principle that was applied had been made clear in the *New England Divisions Case*, 261 U. S. 184. Transportation Act, 1920, had introduced into the federal legislation a new railroad policy. To attain its purpose, "new rights, new obligations, new machinery, were created". "To preserve for the nation substantially the whole transportation system was deemed important". "The existence of the varying needs of the several lines and of their widely varying earning power was fully realized". To attain the object "two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak railroads were to be helped by recapture from prosperous competitors of surplus revenues. Through the

latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carriers' needs". *Id.*, pp. 189-191.

This object of adequately maintaining the whole transportation system may be served in more than these two ways. The underlying principle is that Congress has the power to treat the transportation system of the country as a unit for the purpose of regulation in the public interest, so long as particular railroad properties are not subjected to confiscation. In the light of that principle, and of applications which have been held valid, I am unable to see that the establishment of a unitary system of retirement allowances for employees is beyond constitutional authority. Congress was entitled to weigh the advantages of such a system, as against inequalities which it would inevitably produce, and reach a conclusion as to the policy best suited to the needs of the country. See *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 203; *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331, 343, 344.

Third. Questions are raised as to the classes of persons to be benefited. In considering these objections we should have regard to the explicit provision of the Act as to severability. It states that if "any provision", "or the application thereof to any person or circumstances", is held invalid, "the remainder of the Act or application of such provision to other persons or circumstances shall not be affected". This, of course, does not permit us to rewrite the statute but it does allow the excision of invalid provisions, or inclusions, which can be severed without destroying its structure.

(1) The court below held the Act to be invalid in the view that its provisions were extended to persons not engaged in interstate commerce. In the special findings, classes of persons were listed, numbering 211,107, which were thought to fall within that description. It is manifest that the list was prepared under a misapprehension of the extent of the authority of Congress with respect to employees of interstate carriers and of the application of the decision in the first *Employers' Liability Cases*, 207 U. S. 463. Large numbers of employees were thus deemed to be improperly included whose work, while not immediately connected with the movement of traffic, did have such relation to the activities of the carriers in

interstate commerce as to bring them within the range of congressional power. Thus the list embraced general officers and their staffs who were not in the operating departments connected with transportation, employees who dealt with the receipt and disbursement of moneys, some 86,493 employees in the maintenance-of-equipment departments, who were engaged in the reconstruction or major repair of equipment, withdrawn for that purpose from service, such as locomotives, cars, platform trucks, frogs, switches, etc., as distinguished from light or running repairs; and 36,996 employees whose duties lay in auditing, accounting, and bookkeeping. It should be observed that the decisions under the Second Employers' Liability Act of 1908, with respect to the necessity of the employee being engaged at the time of his injury in interstate transportation or in work so closely related to transportation as to be a part of it, are based upon the limitations of that statute and do not define the scope of constitutional authority as to employees of interstate carriers. *Illinois Central Railroad Company* v. *Behrens*, 233 U. S. 473, 477; *Chicago & Northwestern Railway Co.* v. *Bolle*, 284 U. S. 74, 78.

Interstate carriers cannot conduct their interstate operations without general officers and their staffs, without departments for major repairs and those for administering finances and keeping accounts. General management is as important to the interstate commerce of the carriers as is the immediate supervision of traffic, and the proper maintenance of equipment and the handling of moneys and the keeping of books are as necessary as the loading and moving of cars. In the administration of the Act there would be ample opportunity to make all necessary distinctions between employees engaged in interstate commerce and any others who might be found to be otherwise exclusively employed, so as to exclude the latter from its benefits without impairing the general operation of the Act.

(2) A more serious objection relates to the eligibility for allowances of all those who were in the service within one year prior to the enactment, although they may never be reemployed. Such persons may have been discharged for cause; in any event, for one reason or another, they had left the service and may not return.

I agree with the conclusion that the requirement that the carriers shall pay retiring allowances to such persons is arbitrary and beyond the power of Congress. But I think it clear that the provision for their benefit is within the clause as to severability.

That application of the Act may be condemned and such persons may be excluded from benefits without destroying the measure as a whole.

Fourth. Other questions relate to the details of the pension plan,—principally with respect to the basis of the retirement allowances and the method of their computation.

With the excision of those whose employment was terminated before the Act was passed, the plan would cover those in carrier service at that time and those subsequently employed. Retirement is compulsory at the age of 65, but the service may be extended by agreement for successive periods of one year each until the age of 70. An employee may retire upon completing 30 years of service, but in such case provision is made for reducing the annuity by one-fifteenth for each year below the age of 65. Annuities are calculated by applying graduated percentages of the employee's average monthly compensation (excluding all over $300) to the number of years of his service, not exceeding 30. The maximum annuity thus payable would be $1440, and to receive that amount, it would be necessary for the employee to have been in service 30 years and to have attained the age of 65, and to have been paid an average monthly compensation of $300. Contributions to the pension fund are to be made by employees of a certain percentage of their compensation and the contribution of each carrier is to be twice that of its employees.

An examination of pension plans in operation reveals a variety of possible methods, and Congress was entitled to make its choice. As a basis for the allowance, Congress could select either age or length of service or both. In the selection of any age, or any period of service, anomalies would inevitably occur in particular applications. Extreme illustrations can always be given of the application of regulations which require the drawing of a line with respect to age, time, distances, weights, sizes, etc. To deny the right to select such criteria, or to make scientific precision a criterion of constitutional authority, would be to make impossible the practical exercise of power. Compare *Sproles* v. *Binford*, 286 U. S. 374, 388, 389; *Stanley* v. *Public Utilities Commission of Maine*, decided April 15, 1935. Whatever may be said of the capacity of many men after they have attained 65 years, the fixing of that age or a period of 30 years' service, or a combination of both, for general application, cannot be regarded as an arbitrary choice for railroad employees.

The principal criticism is the bringing into the reckoning of past periods of service—antedating the passage of the Act. The objection is strongly put with respect to those who were in the employment of the carriers when the Act was passed, and it is even more earnestly urged as to those who had left the service and later are reemployed. It is said that the reckoning of their prior periods of employment compels payment for services fully completed and paid for before the enactment. But it seems to be assumed that Congress could compel the dismissal of aged employees, and if it has that power and also has power to establish a pension system, I can find no ground for erecting a constitutional limitation which would make it impossible to provide for employees who were thus severed from the service. The question simply is—What is a fair basis for computing a retirement allowance? Is the plan adopted by Congress destitute of rational support?

Congress could have provided for a retirement allowance in a flat sum, or could have based it upon the amount of compensation which the employee was receiving at the time of retirement, or upon the amount he had received for the preceding year or his average compensation of a longer time. Selecting a period not to exceed 30 years, or the period of service prior to age 65, merely gives a measure for the computation of the retirement allowance. It is in no proper sense a payment for the prior service, any more than would be the fixing of the allowance at a flat figure or on the basis of the last compensation received. The result in dollars and cents might not vary to any great extent whatever method of calculation was chosen.

The power committed to Congress to govern interstate commerce does not require that its government should be wise, much less that it should be perfect. The power implies a broad discretion and thus permits a wide range even of mistakes. Expert discussion of pension plans reveals different views of the manner in which they should be set up and a close study of advisable methods is in progress. It is not our province to enter that field, and I am not persuaded that Congress in entering it for the purpose of regulating interstate carriers, has transcended the limits of the authority which the Constitution confers.

I think the decree should be reversed.

I am authorized to state that Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice CARDOZO join in this opinion.